Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

FRANK A. SKINNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE and BUREAU OF PRISONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prisoner's federal damages claims challenging disciplinary segregation and the loss of visitation rights and commissary privileges resulting from certain alleged prisoner misconduct -- claims that otherwise could proceed without exhaustion of habeas remedies -- nonetheless must be dismissed in favor of habeas because prison officials also chose to revoke good-time credits based on the same incident, and any challenge to the revocation of good-time credits would lie exclusively in habeas.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

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The opinion of the court of appeals (*see* Petitioner's Appendix ("Pet. App.") 1a-18a) is reported at 584 F.3d 1093. The order of the court of appeals denying petitioner's petition for rehearing *en banc* (*see* Pet. App. 40a-41a) is not reported. The relevant opinions of the district court (*id.* at 19a-24a, 25a-29a, 30a-39a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2009. Petitioner timely filed a petition for rehearing *en banc*. The court of appeals denied the petition for rehearing *en banc* on December 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of statutory provisions involved in the case is set out in the accompanying appendix.

STATEMENT

This case raises a question that two Justices of this Court previously have found cert-worthy -- namely, the extent to which prisoners must proceed exclusively in habeas when their civil claims "include challenges to the conditions, as well as to the length or duration, of confinement." *Bressman v. Farrier*, 498 U.S. 1126, 1128 (1991) (White & O'Connor, J.J., dissenting from denial of certiorari). The court of appeals in this case, joining the Eighth Circuit, held that even challenges to the conditions of confinement (such as placement in segregation and limitations on various daily privileges)

must be pursued through habeas if prison officials teamed with that punishment the revocation of good-time credits. The Second, Seventh, and Eleventh Circuits have reached a contrary view, concluding that to deem habeas exclusive in such circumstances impermissibly would encourage prison officials to include the revocation of good-time credits with any other punishment they parcel out, simply to insulate their actions with respect to the other discipline from civil attack. In light of the conflict in the circuits, and because the court of appeals' decision ultimately is in tension with decisions of this Court and the issue presented has important jurisprudential and practical implications, the Court should grant the petition for certiorari.

1. Petitioner Frank A. Skinner is a federal prisoner who was, at the times relevant to this case, housed in a Bureau of Prisons ("BOP") facility in Atlanta, Georgia. *See* Pet. App. 2a. In November 2001, staff at the facility searched Skinner's cell and found a white powder. *See id.* Thereafter, on January 28, 2002, the BOP conducted an internal disciplinary hearing, at which Skinner testified that the white powder was "Tide washing powder." *Id.* at 2a-3a. The hearing officer, however, rejected that testimony, instead siding with the staff's position, supposedly proven by BOP drug test results, that the white powder was cocaine. *See id.* at 3a; Appendix of Ct.-Appointed Amicus Curiae in Ct. of Appeals ("C.A. App.") A27, A31, A155. The hearing officer imposed "mixed" sanctions on Skinner for the alleged possession of cocaine -- that is, punishment affecting both the conditions of his confinement and the duration of his confinement. With respect to the former, the hearing officer imposed punishment of 60 days of disciplinary segregation, the denial of visita-

tion rights for a year, and the denial of commissary privileges for 180 days; as to the duration of his confinement, the hearing officer revoked 40 days of good-time credits. *See* Pet. App. 3a.

Just after the November 2001 search of Skinner's cell, and several weeks before the disciplinary hearing, the BOP had referred the matter to the Federal Bureau of Investigation ("FBI") for potential criminal prosecution. *See id.*; C.A. App. A30. On February 12, 2002 (*i.e.*, after the disciplinary hearing), the FBI issued a letter to the BOP that it was declining to prosecute Skinner, particularly given that it believed the incident, at a minimum, could not "result in a criminal prosecution of greater penal consequences than which can be imposed by the BOP administrative remedies and actions." C.A. App. A159.

In July 2002, Skinner filed a Freedom of Information Act request with the FBI, seeking information associated with the FBI's investigation. *See* Pet. App. 3a. The FBI found 18 pages of material responsive to his request, but withheld production until it could be reviewed by the BOP. *See id.* A month later, the BOP released the material to Skinner. *See id.* One of the documents was the referral form that the BOP had sent to the FBI. *See id.*; C.A. App. A30. The form contained a typed paragraph stating that chemical tests conducted by the BOP indicated the white powder in Skinner's cell was cocaine. *See* Pet. App. 3a; C.A. App. A30. Below that paragraph was the following handwritten notation: "Actually laundry detergent." C.A. App. A30; *see* Pet. App. 3a-4a. Though the record does not reveal who made the notation, Skinner contends that it was the FBI; indeed, the

handwriting in which the notation is made appears at least superficially to match the handwriting of the FBI official who initialed the form elsewhere. *See* Pet. App. 4a; C.A. App. A30; *see generally* Br. of Ct.-Appointed Amicus Curiae in Ct. of Appeals at 9. The form, with the "Actually laundry detergent" notation, is marked in handwriting with the date "1/17/02" -- *i.e.*, a date prior to the disciplinary hearing. C.A. App. A30. Nonetheless, the form was not included in the file that the BOP hearing officer considered in the disciplinary proceeding. *See id.* at A155; *see also* Pet. App. 4a.

2. In August 2004, Skinner filed a *pro se* complaint in the U.S. District Court for the District of Columbia, seeking, in part, damages for violations of the Privacy Act, 5 U.S.C. § 552a. *See* C.A. App. A26-A29. As pertinent here, the Privacy Act requires federal agencies to ensure that any records used in "making any determination about any individual" are "maintain[ed] . . . with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." *Id.* § 552a(e)(5). Section 552a(g)(1)(C) permits an individual to bring a civil action against an agency if the agency "fails to maintain any record concerning [the] individual with such accuracy, relevance, timeliness, and completeness" and "consequently a determination is made which is adverse to the individual." *Id.* § 552a(g)(1)(C). If the court in the civil action finds that the agency "acted in a manner which was intentional or willful," the United States is liable for "actual damages sustained by the individual as a result of" the agency's failure properly to maintain the record. *Id.* § 552a(g)(4)(A). Distilling these statutory provisions, the D.C. Circuit has held that, "to make out a claim for

damages, a 'plaintiff must allege: inaccurate records, agency intent, proximate causation, and an "adverse determination."'" Pet. App. 8a (quoting *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002)).

In support of his damages claims, Skinner alleged that the BOP "deliberately" created a "fals[e]" and incomplete record upon which the "Disciplinary Hearing Officer" relied. C.A. App. A155. In particular, as the court of appeals summarized it, "Skinner assert[ed] that [the] 'BOP fabricated its drug test results' and 'purposefully excluded the [allegedly exculpatory] Referral Form from [his] records in order to retaliate against or otherwise punish him' for an assault complaint he had filed against a prison guard." Pet. App. 13a (quoting Br. of Ct.-Appointed Amicus Curiae in Ct. of Appeals, and citing Compl. and Pls.' Mot. in D. Ct. to Alter of Amend D. Ct. Judg.).

In his prayer for relief in the complaint, Skinner requested "[d]amages for placement in segregation on November 27, 2001 thr[ough] March 26, 2002 [of] ([$]1,000.00 a month x 5 months) $5,000 dollars actual damages." C.A. App. A28. He also sought "[d]amages for adverse effect in record determining custody, classification, job, quarter assignment and los[s] of forty (40) days good conduct credits not less than $5,000." *Id.* In addition, he requested "fines" totaling "$10,000 . . . against the United States as well as litigation costs and Attorney fees." *Id.* at A28-A29. Accordingly, Skinner sought "a total of $20,000 . . . for intentional or willful acts in this Action." *Id.* at A29. Skinner did not seek restoration of the lost good-time credits.

3. In the district court proceedings, the BOP moved to dismiss Skinner's complaint on the grounds that the BOP supposedly had exempted itself from the provisions of the Privacy Act requiring accurate record keeping and thus could not be sued here for damages for the use of inaccurate records. *See* Pet. App. 4a. In this respect, the Privacy Act does authorize an agency to exempt itself, through notice and comment rulemaking, from aspects of the Privacy Act. *See* 5 U.S.C. § 552a(j). The BOP also asserted that Skinner had failed to exhaust administrative remedies. *See* Pet. App. 5a. Finally, in a single footnote, the BOP raised the prospect of habeas being an exclusive remedy and "'reserve[d] the right to brief [the habeas] point at some later stage of the litigation if such stage should come to pass.'" *Id.* at 17a (court of appeals quoting BOP Br. in D. Ct.).

The district court dismissed the complaint on the grounds that the BOP had exempted itself from the accurate-recordkeeping provisions of the Privacy Act. *See* Pet. App. 21a-24a. In moving for dismissal, however, the BOP had not explained to the district court that the relevant BOP exemption regulations did not become effective until well after the January 2001 disciplinary hearing at issue in Skinner's complaint -- namely, not until August 2002. *See* 28 C.F.R. § 16.97(j); *Privacy Act of 1974: Implementation*, 67 Fed. Reg. 51,754 (Aug. 9, 2002). Because Skinner believed that the district court had impermissibly applied the BOP's exemption regulations retroactively to him, he moved to alter or amend the district court's judgment, though after he had also filed a notice of appeal to the D.C. Circuit. *See* C.A. App. A155-A157. The district court then indicated that it was "inclined

to grant" Skinner's motion (having converted it to a motion under Fed. R. Civ. P. 60(b) because it was filed outside of the time for filing a motion to alter or amend a judgment under Fed. R. Civ. P. 59); but the district court added that it could not do so, because the notice of appeal divested the district court of jurisdiction. Pet. App. 28a.

4. On appeal, the D.C. Circuit initially held the matter in abeyance and requested a ruling from the district court on Skinner's motion to alter or amend the judgment. The district court then issued another ruling, but did not address the retroactivity of the BOP's exemption regulations. Instead, the district court denied Skinner's motion to alter or amend the judgment on the grounds that there purportedly was insufficient evidence (though no discovery had been taken) to support a claim that the BOP had intentionally used inaccurate or incomplete records to make a determination adverse to Skinner. Pet. App. 37a-39a. The district court nowhere addressed the referral form to the FBI containing the words "Actually laundry detergent" or the form's absence from the decisional file considered by the hearing officer in the January 2002 disciplinary proceeding.

In its decision on the merits, the D.C. Circuit affirmed the district court's dismissal of Skinner's complaint. It did so on a ground not addressed by the district court: the exclusivity of habeas. The court of appeals first began by summarizing this Court's and its own decisions regarding the exclusivity of habeas versus civil remedies invoked by prisoners. It noted that, under the precedents, "'[c]hallenges to the validity of any confinement or to particulars affecting its

duration are the province of habeas corpus'"; "[i]f success in a 'damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.'" Pet. App. 11a (quoting *Muhammad v. Close*, 540 U.S. 749, 750, 751 (2004) (per curiam)). Invoking those principles, the court of appeals concluded that Skinner's Privacy Act claims for damages must exclusively proceed first through habeas because, "[i]f Skinner were to succeed in demonstrating that BOP intentionally or willfully maintained and acted upon a false record of drug possession, 'plainly the recision of good time would have to be overturned, thus accelerating [Skinner's] release.'" *Id.* at 13a (quoting *Razzoli v. Bur. of Prisons*, 230 F.3d 371, 374 (D.C. Cir. 2000)).

The court of appeals then addressed Skinner's contention "that, even if his claim for damages for loss of good time must first proceed in habeas, the same is not true of his claims for 'damages for other, separate disciplinary harms.'" Pet. App. 14a (quoting Br. of Ct.-Appointed Amicus Curiae in Ct. of Appeals). Rejecting Skinner's argument, the court said:

> [A]lthough those other punishments -- namely, disciplinary segregation and the loss of visitation rights and commissary privileges -- did not affect the length of Skinner's incarceration, they are not 'separate' from the punishment that did. As Skinner's complaint avers, all of his punishments resulted from the same "Incorrect Information" in his file -- and from the same finding of guilt at

> the same hearing on the basis of that information. Compl. at 1. . . . [B]ecause recovery for the "other, separate disciplinary harms" depends on overturning the adverse determination that also led to his loss of good-time credits, if Skinner were to win damages for the former, he would necessarily have demonstrated the invalidity of the latter.

Pet. App. 14a-15a (footnote omitted). Accordingly, because the court of appeals believed "that the good time, segregation, and commissary sanctions were all based on the same finding that Skinner possessed cocaine rather than detergent," even the claims challenging sanctions having no effect on the duration of his custody were "not cognizable unless Skinner first secures relief through a writ of habeas corpus." *Id.* at 15a n.6, 18a.

Finally, the court of appeals rejected Skinner's argument that a damages claim concerning the non-durational punishment could be resolved favorably without "'*necessarily* imply[ing] the invalidity of the deprivation of his good-time credits' as well." *Id.* at 11a (quoting *Edwards v. Balisok*, 520 U.S. 641, 646-47 (1997)) (emphasis added). Skinner had asserted that, "[h]ad the hearing officer seen the [referral] form"--leading the hearing officer to believe there was a dispute in drug testing results between the BOP and the FBI -- "that might have been enough to keep him from ordering Skinner held in segregation [*i.e.*, potentially the harshest of the punishments], even if not enough to prevent him from revoking Skinner's good-time credits." *Id.* at 15a. But the court of appeals held otherwise, emphasizing that, to succeed in obtaining

damages for the segregation, "Skinner must show that BOP *intentionally or willfully* kept the allegedly exculpatory FBI form out of his disciplinary hearing." *Id.* (emphasis in original). Such "a showing," in the court's view, inevitably must also result in invalidation of the loss of good-time credits. *Id.* at 15a-16a. The court added that, even if success on the damages claim for the segregation would not "necessarily imply" the invalidity of the loss of good time, it was enough under its own precedents that the "'non-habeas claim would have *a merely probabilistic* impact on the duration of custody.'" *Id.* at 16a n.7 (quoting *Razzoli*, 230 F.3d at 373) (emphasis added).

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' Decision Conflicts with the Decisions of Other Circuits

The question in this case concerns the demarcation between habeas remedies and civil claims in prisoner situations, a subject matter explored in a now lengthy line of this Court's decisions dealing with state prisoners seeking relief under 42 U.S.C. § 1983. *E.g.*, *Wilkinson v. Dotson*, 544 U.S. 74 (2005); *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam); *Edwards v. Balisok*, 520 U.S. 641 (1997); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

"These cases, taken together, indicate" that a prisoner's civil action "is barred . . . -- no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) -- if success in that action would *necessarily* demonstrate the inva-

lidity of *confinement or its duration*." *Wilkinson*, 544 U.S. at 81-82 (emphasis altered). Stated differently, "[t]hroughout the legal journey [beginning with] . . . *Preiser*," the Court has insisted that "state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement -- either directly through an injunction compelling speedier release or indirectly through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Id.* at 81 (emphasis removed). Notably, three of the decisions in which the Court found § 1983 claims in some measure barred by habeas involved challenges to prison disciplinary proceedings that had resulted in the revocation of earlier-earned good-time credits, since success on the claims would have meant, or necessarily implied, a shorter prison stay. *See Balisok*, 520 U.S. at 643; *Wolff*, 418 U.S. at 555; *Preiser*, 411 U.S. at 476.

At the same time, the Court has emphasized that a prisoner *can* pursue civil remedies, irrespective of habeas, to contest the lawfulness of "prison disciplinary proceedings in the absence of any implication going to the fact or duration of [the] underlying sentence." *Muhammad*, 540 U.S. at 754. While "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus, . . . requests for relief turning on circumstances of confinement may be presented in a § 1983 action." *Id.* at 750. Thus, the Court in *Muhammad* allowed a § 1983 action to go forward, where the prisoner sought damages for allegedly being placed unlawfully in "detention and deprived of privileges for 30 days as penalties for insolence." *Id.* at 753; *see also Wilkinson*, 544 U.S. at 82 (permitting § 1983 challenge

to state parole board procedures that would lead to "new [parole] eligibility review," as opposed to "immediate release" or "a shorter stay in prison").

Among, however, the questions "left open" in the Court's jurisprudence on habeas's exclusivity -- and at issue in this case -- is "whether, where disciplinary proceedings result in sanctions that affect both the conditions of confinement as well as its duration, a prisoner can proceed separately with a [civil] . . . claim with respect to the parts of his punishment affecting only the conditions of confinement." *Peralta v. Vasquez*, 467 F.3d 98, 103 (2d Cir. 2006). As commentators have put it:

> There is . . . the problem of mixed claims. What if a disciplinary hearing, which is allegedly procedurally inadequate, leads to the imposition of both a sanction with durational implications and a sanction without durational implications? For example, a prisoner might be placed in more restrictive confinement conditions and deprived of accumulated good-time credits. The former, if imposed alone, would be cognizable under § 1983 because it does not trigger *Heck* [*v. Humphrey, supra*] at all. The problem is that prevailing in a procedural challenge to the hearing that imposed restrictive confinement necessarily implies that the other penalty -- the deprivation of good-time credits, which is clearly within the *Heck* bar -- is also invalid.

Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Con-*

sequences, 58 Duke L.J. 1, 33 (Oct. 2008) ["King & Sherry"].

On the issue of mixed claims, the courts of appeals "have come to different conclusions." *Id.* at 34. On one end of the spectrum is the D.C. Circuit, as reflected in this case. Skinner, through his civil claims, sought damages for unlawful segregation and for loss of privileges *as well as* for the loss of good-time credits. Although all of the punishments, except for the loss of good-time credits, "did not affect the length of Skinner's incarceration," the court of appeals found his civil claims relating to the non-durational punishments unactionable because "recovery for the 'other, separate disciplinary harms' depends on overturning the adverse determination that also led to his loss of good-time credits." Pet. App. 14a, 15a (quoting Br. of Ct.-Appointed Amicus Curiae in Ct. of Appeals). Likewise, the Eighth Circuit has concluded that a § 1983 action is barred where the prisoner challenges prison "disciplinary action, resulting in the forfeiture of good-time credits *and* disciplinary segregation." *Bressman v. Farrier*, 900 F.2d 1305, 1308 (8th Cir. 1990); *accord Offett v. Solem*, 823 F.2d 1256, 1260 (8th Cir. 1987).

In the middle of the spectrum is the Second Circuit. In *Peralta v. Vasquez*, 467 F.3d 98 (2d Cir. 2006), the prisoner challenged in a § 1983 action the constitutionality of a disciplinary proceeding that had resulted in "a penalty of five years of confinement in the Special Housing Unit . . ., five years loss of packages, commissary, and telephone privileges, and five years loss of good-time credits." *Id.* at 100. Judge Calabresi, writing for the court, noted at the outset that the *Preiser* line of cases plainly mandated the exhaustion of ha-

beas remedies -- what he termed a "'favorable termination requirement'" -- prior to disputing in a civil action "a sanction that affects the duration of [a prisoner's] sentence, such as the deprivation of good-time credits." *Id.* But he also emphasized that it "is not clear" what should occur "in 'mixed sanctions' cases." *Id.*

Ultimately, Judge Calabresi devised what has since been described as an "ingenious solution" (King & Sherry, 58 Duke L.J. at 34) to "this open question." *Peralta*, 467 F.3d at 100. The Second Circuit in *Peralta* held that, in a mixed sanctions case, "a prisoner can, without demonstrating that the challenged disciplinary proceedings or resulting punishments have been invalidated [through habeas], proceed separately with a § 1983 action aimed at the sanctions or procedures that affected the conditions of his confinement"; however, the court added the caveat that the prisoner "may only bring such an action if he agrees to abandon forever any and all claims he has with respect to the sanctions that affected the length of his confinement." *Id.* That agreement would need to be made "formally" on the record, so that "judicial estoppel" would thereafter attach to the prisoner's agreement. *Id.* at 105-06.

In reaching that result, the Second Circuit was convinced that "unfortunate incentives" would accompany a blanket rule against pursuing civil claims with respect to the non-durational aspects of a mixed sanctions case (such as the rule adopted by the D.C. Circuit here and the Eighth Circuit). *Id.* at 106 n.8. "[T]he rule advanced by the defendants, which, absent favorable termination, would ban a § 1983 action whenever a disciplinary proceeding resulted in the

extension of confinement as well as a change in confinement conditions, would create the incentive to include as part of every instance of prisoner punishment a sanction that affected the duration of the prisoner's sentence -- even if it would just be the loss of one day's worth of good-time credit." *Id.* Yet, the court did not unqualifiedly endorse the § 1983 claim (*i.e.*, allow it without a waiver of future challenges to durational aspects of the punishment) because, otherwise, if the "prisoner prevails in his § 1983, conditions of confinement, action, he may, seek to estop the state, collaterally, from defending the sanctions affecting length of imprisonment" -- a consequence that the Second Circuit deemed inconsistent with *Preiser* and its progeny. *Id.* at 105.

On the other end of the spectrum from the D.C. Circuit and the Eighth Circuit are the Seventh and Eleventh Circuits, both of which have authorized, without the restriction put in place by the Second Circuit in *Peralta*, civil challenges to non-durational aspects of punishment resulting from disciplinary proceedings that also led to the revocation of good-time credits. In *Viens v. Daniels*, 871 F.2d 1328 (7th Cir. 1989), state prisoners challenged in a § 1983 action a disciplinary proceeding in which prison officials "revoked 360 days of each plaintiffs' good time credits, ordered plaintiffs placed in disciplinary segregation for 360 days and demoted the plaintiffs from 'A' grade to 'C' grade for 360 days," which resulted in them losing their prison jobs. *Id.* at 1330.

The *Viens* court permitted declaratory, injunctive, and damages claims to proceed without the exhaustion of habeas remedies, because the state officials, "as the

outcome of the hearings challenged here, imposed substantial discipline on the plaintiffs apart from the revocation of good time." *Id.* Though any effort to "seek restoration of good time" was barred, the § 1983 claims "otherwise" could proceed. *Id.* The court recognized that a favorable ruling in the § 1983 case might "act as collateral estoppel in a later habeas corpus proceeding seeking restoration of good time," but nonetheless authorized the § 1983 claim because, "under the collateral estoppel standard [pressed by the defendants,] the state could insulate every imposition of discipline from attack under section 1983 by simply revoking one hour, or one day of good time as part of every punishment it imposed." *Id.* at 1330, 1333. The court did, however, emphasize that the punishments, other than the revocation of good-time credits, must be "substantial" so that prisoners cannot be seen as "challeng[ing] these sanctions merely as a pretext to attack[ing] the revocation of good time." *Id.* at 1334; *accord id.* at 1336 (Ripple, J., concurring) ("[T]he Adjustment Committee imposed substantial discipline on the plaintiffs apart from the revocation of good time. This action therefore is *primarily* a challenge to the conditions of confinement, not its duration . . . .") (emphasis added).[1]

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[1] There may be some question whether dueling standards exist in the Seventh Circuit in mixed sanctions cases. Notwithstanding *Viens*, a subsequent panel of the Seventh Circuit -- in a case in which the prisoner actually pursued habeas rather than § 1983 -- held that habeas was the exclusive remedy for asserting that "Indiana violated the due process clause of the fourteenth amendment when it placed him in disciplinary segregation and reduced his

Like the Seventh Circuit in *Viens*, the Eleventh Circuit has not relegated solely to habeas a challenge to disciplinary proceedings that led both to durational and non-durational punishments. *See Gwin v. Snow*, 870 F.2d 616 (11th Cir. 1989). In *Gwin*, a prisoner alleged in a § 1983 action that a prison disciplinary board "practiced racial discrimination" in its decision-making, resulting in both a denial of parole and a denial of "a compassionate leave when his mother died." *Id.* at 618. Though the Eleventh Circuit said the lower court "properly dismissed Gwin's challenge to his denial of parole" in light of *Preiser*, it held that Gwin could bring his "claim challenging the denial of compassionate leave" without "exhausting state [habeas] remedies." *Id.* at 620, 624, 619. The latter claim, "if successful, will not lessen the duration of his sentence by one day." *Id.* at 624.

In sum, then, the courts of appeals have adopted divergent approaches on the exclusivity of habeas in

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credit-earning class." *Montgomery v. Anderson*, 262 F.3d 641, 643 (7th Cir. 2001). Though the court held that the prisoner "cannot use § 1983 to challenge his segregation," it addressed the point perfunctorily in a few sentences. *Id.* Moreover, had the *Montgomery* panel actually intended to depart from *Viens*, circuit rules required the panel to note in the opinion both the departure and that the opinion had been circulated to the full court preliminarily for review, neither of which are, in fact, noted in the *Montgomery* decision. *See* Seventh Cir. R. 40(e). Such a situation "counsels in favor of construing [*Viens*] to mean what it says, rather than attributing to [*Montgomery*] a repudiation of existing authority both silent and sweeping." *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 891 (7th Cir. 1996).

mixed cases. Had Skinner's case arisen in the Second Circuit, the courts would have permitted him to pursue in a civil case a damages claim challenging his segregation and loss of prison privileges, so long as he formally renounced any effort ever to challenge the loss of good-time credits. Had his case arisen in the Seventh or Eleventh Circuits, he could have pursued the civil case even without any such renunciation, particularly because the punishment he faced other than the loss of good time was substantial. Because his case instead arose in the D.C. Circuit (and likewise if it had arisen in the Eighth Circuit), his civil claims were altogether foreclosed. To resolve the serious conflict in the circuits, the Court should grant the petition for certiorari.

B. The Court of Appeals' Decision Is in Tension with This Court's Decisions

The D.C. Circuit's decision also is, on the merits, at odds with this Court's decisions, further bolstering the case for granting the petition. First of all, *Preiser* addressed, albeit in *dictum*, the exact situation presented in this case and came to a conclusion opposite to the court of appeals. In *Preiser*, the Court added the following footnote near the end of its opinion:

> If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from *simultaneously litigating in federal court, under*

> *§ 1983, his claim relating to the conditions of his confinement.*

Preiser, 411 U.S. at 499 n.14 (emphasis added); *see also id.* at 510 (Brennan, J., dissenting) ("the Court today . . . holds that insofar as a prisoner's claim relates to good-time credits, he is required to exhaust state remedies; but he is not precluded from simultaneously litigating in federal court, under § 1983, his claim for monetary damages or an injunction against continued segregation").

To be sure, both the Second Circuit in *Peralta* and the D.C. Circuit in this case appeared to believe that this Court's decisions subsequent to *Preiser* created the greatest potential obstacle to a straightforward allowance for civil challenges to the non-durational punishments in mixed cases -- most notably, *Heck* and *Balisok* and those decisions' emphasis that habeas bars a § 1983 claim if success under § 1983 would *necessarily imply* speedier release, including the invalidity of the revocation of good-time credits. *See Peralta*, 467 F.3d at 105; Pet. App. 13a-14a. Hence, while *Preiser* may not provide the final answer on the question of how to treat mixed cases, the D.C. Circuit's adoption of an approach categorically opposite to the one espoused in *Preiser*, at a minimum, casts serious doubt on its decision in this case.

Next, the court of appeals' decision is in tension with *Wolff v. McDonnell*, 418 U.S. 539 (1974). Indeed, in its lengthy analysis of the Court's precedents on habeas exclusivity, the court of appeals mentioned all of the decisions in the *Preiser* line, except *Wolff*. Yet, *Wolff* is the decision most analogous to Skinner's circumstances, and the Court in *Wolff* did permit some § 1983

claims to go forward, notwithstanding that it, at the same time, found a § 1983 claim seeking restoration of good-time credits barred by habeas.

In *Wolff*, state prisoners brought a § 1983 action challenging the revocation of good-time credits by means of disciplinary procedures that they alleged did not comport with constitutional due process. They also sought a declaration that the disciplinary procedures were invalid, and they raised a "damages claim [that] . . . required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious [official] misconduct." 418 U.S. at 554. The Court held that "only an injunction restoring good time improperly taken is foreclosed." *Id.* at 555. "[A] declaratory judgment as a predicate to a damages award would not be barred by *Preiser*; . . . neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations." *Id.*

Wolff thus holds that a civil claim for declaratory and damages relief *may be* allowable to challenge the legality of a disciplinary proceeding, even if good-time credits were revoked as part of that disciplinary proceeding (though the actual restoration of the good-time credits is precluded). On its face, that holding is compatible with Skinner's position that he can raise a civil claim seeking damages for his segregation and loss of prison privileges, even if he cannot seek restoration of (or damages for) the loss of good-time credits.

Admittedly, the Court later in *Balisok* construed *Wolff* as a case where "the nature of the challenge to the procedures" was such that a ruling in favor of the

Wolff prisoner on the declaratory and damages claims would not necessarily "'call into question the lawfulness of the plaintiff's continuing confinement [*i.e.*, the loss of good time credits].'" *Balisok*, 520 U.S. at 645-46 (quoting *Heck*, 512 U.S. at 482-83). For instance, even if the procedures used by prison officials to deny good-time credits in *Wolff* violated due process, use of constitutionally valid procedures might likewise have resulted in the prisoner losing good-time credits for the misconduct there investigated, making relief on the declaratory and damages claims in *Wolff* not an *inevitable* barometer of the validity of the deprivation of good-time credits. Seizing on *Balisok*, the D.C. Circuit in Skinner's case said that his challenge to his disciplinary proceeding was in the nature of "'a biased hearing officer . . . dishonestly suppress[ing] evidence of innocence'" (with the evidence being the referral form to the FBI stating "Actually laundry detergent"). Pet. App. 13a (quoting *Balisok*, 520 U.S. at 647). If Skinner were to succeed in showing the bias of the hearing officer so as to win his Privacy Act damages claims associated with his segregation and loss of privileges, "plainly the recision of good time would have to be overturned, thus accelerating [Skinner's] release." *Id.* (internal quotation marks omitted).

But this was a misreading of Skinner's allegations. Skinner did not aver that the hearing officer was biased, but that the bias was on the part of the staff responsible for searching his cell, investigating what was found there, and compiling the evidence for the hearing officer. *See* C.A. App. A155 (Skinner arguing that "[s]anctions by the . . . Disciplinary Hearing Officer['s] reasonable reliance o[n] information provided" to him "cannot immunize an agency from the Privacy

Act consequences of employing other individuals who (allegedly) deliberately falsify records"). Were Skinner to prove the staff's bias in the course of winning his damages claims for segregation and the loss of prison privileges, his victory would not *necessarily* call into question the validity of the revocation of good time credits. If Skinner showed that the prison staff intentionally excluded the referral form from the records presented to the hearing officer, and if the hearing officer had in reality had that referral form before him, the hearing officer still conceivably might have revoked the good-time credits. In those circumstances, the hearing officer would have had before him divergent evidence (namely, staff testimony that the white powder was cocaine, and an FBI referral form saying differently), which may have led him to impose the less harsh punishment of revoking good-time credits, while not sending Skinner into lengthy segregation.[2]

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[2] Of course, were the Court in this case on the merits to adopt an approach similar to those used by the Second, Seventh, and Eleventh Circuits in mixed cases -- so that a prisoner could bring a civil claim with respect to non-durational harm even when the result would undermine the validity of durational harm -- then there would be no need for Skinner to show that a win on his non-durational claims would not necessarily call into doubt the revocation of good-time credits. Our points here are only that, first, it is consistent with this Court's current precedents (such as *Wolff*) for a prisoner to pursue civil claims relating to a single disciplinary proceeding that led to durational and non-durational sanctions so long as success on the non-durational claims would not necessarily imply the invalidity of the durational sanction and, second, success on Skinner's

Still, even with a proper application of *Wolff*, the court of appeals likely would still have affirmed the district court's dismissal of all of Skinner's Privacy Act claims. That is because the court would then have applied its own precedents for dealing with federal prisoners, as opposed to the state prisoner involved in *Wolff*. In a case whose continuing application has spawned criticism within the circuit, the D.C. Circuit has limited to *state prisoners* this Court's rule that habeas bars a damages claim only when success on the damages claim would *necessarily* imply a shorter confinement. *Razzoli v. Bureau of Prisons*, 230 F.3d 371, 375 (D.C. Cir. 2000); *cf. Davis v. Fed. Bureau of Prisons*, 334 Fed. Appx. 332, 333 (D.C. Cir. 2009) (Griffith, J., concurring) (criticizing *Razzoli*), *pet. for cert. filed* Feb. 1, 2010, No. 09-8894. Instead, because of the D.C. Circuit's historical view that habeas is available for federal prisoners anytime the grievance merely "implicates" the duration of confinement or involves just an alleged "unlawful term or condition of custody," *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 808, 809 n.4 (D.C. Cir. 1988) (*en banc*), the court in *Razzoli* ruled that habeas is exclusive "even when a non-habeas claim would have a merely probabilistic impact on the duration of custody." *Razzoli*, 230 F.3d at 373; *accord id.* at 375 ("*Preiser* . . . require[s] habeas for a federal prisoner's attack on a parole eligibility decision, reversal of which would merely give him a *chance* at earlier parole.") (emphasis in original).

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damages claims for segregation and loss of privileges would not necessarily cast doubt on the loss of good-time credits.

Based on *Razzoli*, the court of appeals would have held that, even if (reminiscent of *Wolff*) success on the damages claims contesting the segregation and loss-of-privileges sanctions would not *necessarily* imply the invalidity of the loss of good-time credits, it *probably* would undermine the validity of the loss of those credits; and the court would then have -- on that basis -- relegated all of Skinner's claims to habeas. In fact, the court warned that it would have invoked *Razzoli* but for its view that, in reality, "Skinner's success in a damages action would *necessarily* imply the invalidity of the revocation of his good-time credits." Pet. App. 16a n.7 (emphasis added).

Defeating Skinner's claims on the basis of *Razzoli* is no less problematic than is ignoring the symmetry between this case and *Wolff*. *Razzoli*'s "probabilistic" standard derives from *Chatman-Bey*, and *Chatman-Bey* held that habeas is the exclusive remedy for challenging the procedures for determining mere parole *eligibility* (not actual release), a view that this Court roundly rejected in *Wilkinson*, 544 U.S. at 81. *See Davis*, 334 Fed. Appx. at 333 (Griffith, J., concurring). Further, as Justice Scalia noted in his concurrence in *Wilkinson*, the "scope of permissible relief" in habeas is the same for federal and state prisoners, thus undercutting any argument that a more robust habeas-channeling rule should apply to federal prisoners due to a supposedly broader availability of habeas relief. *Wilkinson*, 544 U.S. at 87 (Scalia, J., concurring).

In the end, the D.C. Circuit's decision in this case is at odds with *Preiser*, *Wolff*, and *Wilkinson*. Given that tension, and in light of the conflict in the circuits over habeas's exclusivity in mixed sanctions situations, the

Court should grant the petition for certiorari in this case.

C. The Issue Presented in This Case Is an Important One Warranting the Court's Review

The issue presented in this case is both legally and practically significant. As a jurisprudential matter, "jurists frequently [have] bemoan[ed] the difficulties and frustrations they encounter in attempting to solve *Preiser* puzzles." Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 85, 87-88 (1988); *see also* King & Sherry, 58 Duke L. J. at 3. One such puzzle has been how to deal with mixed sanctions cases. Not only have, as already mentioned, the courts of appeals divided on the topic, but Justices of this Court have recognized previously the necessity for the Court to provide direction on the extent of habeas's exclusivity where claims challenge both the conditions of confinement and the duration of custody. *See Bressman v. Farrier*, 498 U.S. 1126, 1128 (1991) (White & O'Connor, J.J., dissenting from denial of certiorari); *see also Preiser*, 411 U.S. at 508 (Brennan, J. dissenting) ("It should be plain enough that serious difficulties will arise whenever a prisoner seeks to attack in a single proceeding both the conditions of his confinement and the deprivation of good-time credits."). While the Court provided initial direction with the *dictum* in *Preiser*, the Court's subsequent decisions in, in particular, *Heck* and *Balisok* have clouded the picture. The Court should, with this case, settle a long-simmering question.

In so doing, the Court would also be resolving an issue with enormous practical significance for the prison population. Just as a matter of litigation, prisoners are faced potentially with litigating the preliminary question of the appropriate forum for their dispute in every instance where they challenge a disciplinary proceeding that resulted in durational and nondurational punishment. They "often have to cope with these questions without even minimal assistance of counsel." *Preiser*, 411 U.S. at 512 (Brennan, J., dissenting). The Court's resolution of habeas's application in mixed sanctions cases would help erase the preliminary issue and thereby ease the litigation burdens for prisoners, as well as for the officials named as defendants and for the courts otherwise faced with resolving the issue.

Moreover, as the Second Circuit in *Peralta* and the Seventh Circuit in *Viens* observed, prison officials (at least in some circuits) currently have incentive artificially to add the revocation of good-time credits any time they punish a prisoner, so as to limit the possibility of a § 1983, Privacy Act, or other civil attack. *Accord Preiser*, 411 U.S. at 508-09 (Brennan, J., dissenting) (rule disallowing § 1983 challenge to nondurational harm in mixed case "creates an undeniable, and in all likelihood irresistible, incentive for state prison officials to defeat the jurisdiction of the federal courts by adding the deprivation of good-time credits to whatever other punishment is imposed"). The Court should grant the petition in this case, reverse the D.C. Circuit's decision, and end the prospect of such "gaming of the system."

Finally, a grant of certiorari in this case would allow the Court, for the first time, to review application of the habeas-channeling rule in connection with *federal* prisoners. Because of its decision in *Razzoli*, the D.C. Circuit (the venue for many federal prisoner claims) has, amidst growing dissent within the circuit, established separate standards for state and federal prisoners: state prisoners may sue civilly, rather than just in habeas, so long as their civil claims do not necessarily call into question the fact or duration of their confinement; but federal prisoners must proceed exclusively in habeas whenever there is *a chance* or a *probability* that a civil claim they otherwise might bring would affect the fact or duration of their confinement. This distinction is "incorrect" (*Davis*, 334 Fed. Appx. at 333 (Griffith, J., concurring)); at a minimum, the Court should determine the appropriateness of such dual tracks, before still another *Preiser* puzzle becomes even more perplexing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 2009
Decided October 27, 2009

No. 05-5284
FRANK A. SKINNER,
APPELLANT
v.
UNITED STATES DEPARTMENT OF JUSTICE
AND BUREAU OF PRISONS,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 04cv01376)

Yvonne M. Williams, appointed by the court, argued the cause as *amicus curiae* in support of appellant. With her on the brief was *Anthony F. Shelley*, appointed by the court.

Frank A. Skinner, pro se, filed the briefs for appellant.

W. Mark Nebeker, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief were *Jeffrey A. Taylor*, U.S. Attorney at the time the brief was filed, and *R. Craig Lawrence*, Assistant U.S. Attorney. *Lisa S. Goldfluss*, Assistant U.S. Attorney, entered an appearance.

Before: GARLAND, *Circuit Judge*, and EDWARDS and RANDOLPH, *Senior Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: A Bureau of Prisons hearing officer found prisoner Frank Skinner guilty of possessing drug paraphernalia and imposed sanctions that included the loss of 40 days of good-time credits. Skinner sued the agency under the Privacy Act, 5 U.S.C. § 552a, seeking damages and amendment of his prison records. The district court dismissed both claims on the ground that inmate records are exempt from the relevant provisions of the Act. We affirm that reasoning with respect to Skinner's claim for amendment of his records. We affirm the court's dismissal of Skinner's damages claim on the alternative ground that such a claim is not cognizable unless Skinner first secures relief through a writ of habeas corpus.

I

Frank Skinner is a federal prisoner who was housed at a Bureau of Prisons (BOP) facility in Atlanta, Georgia. On November 27, 2001, staff at the facility searched Skinner's cell and locker and found a white powder that tested positive for cocaine. *Skinner v. U.S. Dep't of Justice*, No. 04-1376, 2005 WL 1429255, at *1 (D.D.C. filed June 20, 2005). BOP conducted an internal disciplinary hearing on January 28, 2002. At the hearing, Skinner testified that the substance found in his locker was "[T]ide

washing powder," which the hearing officer noted in his report. *See* Discipline Hearing Officer Report (Feb. 5, 2002). The officer, however, found that Skinner had actually possessed cocaine and imposed sanctions that included the loss of 40 days of good-time credits[1], 60 days of disciplinary segregation, the denial of visitation rights for a year, and the denial of commissary privileges for 180 days. BOP also referred the matter to the FBI, which declined to prosecute Skinner because the case would not "result in a criminal prosecution of greater penal consequences than which can be imposed by the BOP administrative remedies and actions." Letter from T. Jackson to G. Duncan (Feb. 12, 2002).

Skinner filed a number of administrative appeals within BOP, and on July 8, 2002, he also filed a Freedom of Information Act request with the FBI. The FBI informed Skinner that its records contained 18 pages that were responsive to his request. Because the documents had originated with BOP, the FBI referred the request to BOP, which released the documents to Skinner on August 15. One of the documents was the referral form BOP had sent to the FBI. The form contained a typed paragraph stating that chemical tests conducted by BOP indicated the white powder in Skinner's locker was cocaine. Below that paragraph was the

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[1] Pursuant to 18 U.S.C. § 3624(b), a federal prisoner who complies with disciplinary regulations is eligible to receive credits -- known as good-time credits -- of up to 54 days per year toward the service of the prisoner's sentence.

following handwritten notation: "Actually laundry detergent." Referral of an Inmate Matter for Investigation (Dec. 12, 2001). There is no evidence in the record regarding who made the notation or what was meant by it. Skinner alleges that it reflects the results of an "independ[e]nt analysis" of the powder by the FBI, Pl.'s Mot. to Alter or Amend J. at 2, but also acknowledges that "[n]one of the suspected contraband was forwarded" to the FBI "for laboratory testing," Pl.'s Authentication or Identification to Compl. Doc. Ex. "A."

On August 13, 2004, Skinner filed a pro se complaint in the United States District Court for the District of Columbia, alleging that the powder found in his locker was laundry detergent rather than cocaine, that the FBI referral form indicated as much, and that his BOP file was therefore inaccurate. He requested two remedies under the Privacy Act, 5 U.S.C. § 552a. First, he sought money damages for the punishments BOP had imposed on the basis of its finding that he possessed cocaine. Second, Skinner alleged that the "[a]genc[y] did not meet requirements of [the] Privacy Act by indicating that [the] inmate disputed information in his files." Compl. at 1. The district court treated this as a request for amendment of Skinner's records. *Skinner*, 2005 WL 1429255, at *1 & n.2.

BOP filed a motion to dismiss for failure to state a claim or, in the alternative, for summary judgment. BOP argued, first, that the complaint should be dismissed because BOP had exempted inmate records from the relevant provisions of the Privacy Act. Second, BOP maintained that Skinner's

amendment claim was barred because he had failed to exhaust administrative remedies. Finally, in a footnote, BOP offered a "third and independent ground for dismissal." Citing *Razzoli v. Bureau of Prisons*, 230 F.3d 371 (D.C. Cir. 2000), the agency contended that Skinner's "claims could only be filed in the context of a *habeas corpus* action." Mem. in Support of Defs.' Mot. to Dismiss and/or for Summ. J. at 10 n.2. On June 20, 2005, the district court granted the motion to dismiss on the first ground urged by BOP: that the records were exempt.

On July 12, 2005, Skinner filed an appeal of that judgment, and on August 5 he filed a "Motion to Alter or Amend Judgment" with the district court, arguing that the disciplinary hearing he was challenging had taken place before BOP promulgated the exemption that the court applied to his damages claim. A panel of this court ordered the appeal held in abeyance so that the district court could consider Skinner's motion, which the district court ultimately denied on March 31, 2008. On October 16, 2008, BOP filed a motion for summary affirmance in this court, which we denied. Thereafter, we appointed amicus curiae to present arguments in support of Skinner's position.

II

The Privacy Act imposes a set of substantive obligations on agencies that maintain systems of records, including the requirement that records used in making determinations about individuals be accurately maintained. *See* 5 U.S.C. § 552a(e)(5). The Act also provides civil remedies for its violation, including court-ordered amendment of records and

money damages. The district court dismissed both Skinner's amendment and damages claims for failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). Our review is therefore de novo. *Razzoli*, 230 F.3d at 374. We address Skinner's claim for amendment in Part II.A and his claim for damages in Part II.B.

A

Skinner's suit seeks amendment of his inmate records, although the kind of amendment he seeks is not entirely clear. In places, Skinner's pleadings appear to request an amendment indicating that he possessed laundry detergent rather than cocaine. *See* Amicus Curiae Br. 11 (noting that Skinner filed administrative appeals "to have his records amended to accurately reflect that the substance found in his locker was laundry detergent"). In other places, the pleadings suggest that he merely wants his file to include the form containing the handwritten notation, "[a]ctually laundry detergent." *See* Amicus Curiae Reply Br. 5. Regardless of the nature of the amendment sought, this claim is quickly dispatched.

Privacy Act § 552a(e)(5) requires agencies to ensure that any records used in "making any determination about any individual" are "maintain[ed] . . . with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5). Section 552a(d) requires agencies to entertain requests for amendment of records that are not "accurate, relevant, timely, or complete." *Id.* § 552a(d)(2). If an

agency rejects a request for amendment, the subject of the contested record can bring suit in federal court and obtain de novo consideration of whether amendment is warranted. *Id.* § 552a(g)(1)(A), (g)(2)(A). If the court so finds, it "may order the agency to amend the individual's record." *Id.* § 552a(g)(2)(A); *see generally Doe v. United States*, 821 F.2d 694, 697 & n.8 (D.C. Cir. 1987) (en banc).

But the Privacy Act also permits agencies to exempt certain of their systems of records from many of the obligations it imposes. 5 U.S.C. § 552a(j). In 1976, BOP exempted its Inmate Central Records System from § 552a(d)'s amendment provision. *See* 28 C.F.R. § 16.97(a); Exemption of Record Systems Under the Privacy Act, 41 Fed. Reg. 12,640, 12,650 (Mar. 26, 1976). As the district court found, as our precedents make clear, and as amicus acknowledged at oral argument, that exemption prevents us from ordering the amendment of an inmate's records. *See White v. U.S. Probation Office*, 148 F.3d 1124, 1125 (D.C. Cir. 1998); *Risley v. Hawk*, 108 F.3d 1396, 1397 (D.C. Cir. 1997); Oral Arg. Recording at 2:48-3:12. Accordingly, we affirm the district court's dismissal of Skinner's amendment claim.

B

Skinner also seeks damages for the consequences of the alleged inaccuracy in his records.

As we have noted, Privacy Act § 552a(e)(5) requires agencies to ensure that all records "used by

the agency in making any determination about any individual" are maintained "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5). Section 552a(g)(1)(C) permits an individual to bring a civil action against an agency if the agency "fails to maintain any record concerning [the] individual with such accuracy, relevance, timeliness, and completeness" and "consequently a determination is made which is adverse to the individual." *Id.* § 552a(g)(1)(C). If the court finds that the agency "acted in a manner which was intentional or willful," the United States is liable for "actual damages sustained by the individual as a result of" the agency's failure to properly maintain the record. *Id.* § 552a(g)(4); *see generally Doe*, 821 F.2d at 697 n.8. In sum, to make out a claim for damages, a "plaintiff must allege: inaccurate records, agency intent, proximate causation, and an 'adverse determination.'" *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002); *see Deters v. U.S. Parole Comm'n*, 85 F.3d 655, 657 (D.C. Cir. 1996).

The district court dismissed Skinner's damages claim on the same ground upon which it dismissed his amendment claim: that BOP had exempted inmate records from the provisions of the Privacy Act. But while BOP's 1976 regulation exempted prison records from Privacy Act § 552a(d), the provision regarding amendment of inaccurate records, that regulation did not exempt BOP records from § 552a(e)(5), the provision creating the duty to accurately maintain records "used . . . in making any

determination." *See Deters*, 85 F.3d at 658 n.2; *Phillips v.Hawk*, No. 98-5513, 1999 WL 325487, at *1 (D.C. Cir. Apr. 14, 1999). And as we explained in *Sellers v. Bureau of Prisons*, the damages provision of Privacy Act § 552a(g) provides a remedy for violations of § 552a(e)(5). 959 F.2d 307, 310 (D.C. Cir. 1992); *see Deters*, 85 F.3d at 657.

On August 9, 2002, BOP did promulgate a regulation exempting its records from § 552a(e)(5). *See* 28 C.F.R. § 16.97(j); Privacy Act of 1974: Implementation, 67 Fed. Reg. 51,754 (Aug. 9, 2002). Skinner's lawsuit was filed after thatdate, but his complaint is premised on a BOP disciplinary determination that took place seven months earlier. As a consequence, Skinner contends that it would be impermissibly retroactive to apply the § 552a(e)(5) exemption to his lawsuit. We need not resolve this issue, however, because there is another ground for dismissal that is clearly established by a series of decisions of both the Supreme Court and this circuit. Under those precedents, Skinner's civil damages claim is barred unless and until he successfully challenges the disciplinary hearing on which it is based through an action in habeas corpus.

The series of cases begins with *Preiser v. Rodriguez*, in which the Supreme Court held that a state prisoner cannot sue prison authorities under 42 U.S.C. § 1983[2] for injunctive relief to compel

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[2] Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

restoration of good-time credits because victory in such a suit would shorten the prisoner's sentence. 411 U.S. 475 (1973). As the Court explained, when a "state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus" even if his claim comes within the literal terms of § 1983. *Id.* at 500; *see id.* at 489-90. In *Heck v. Humphrey*, the Court extended this rule to a § 1983 suit seeking money damages -- but neither an injunction nor release -- for an unconstitutional conviction. 512 U.S. 477, 479, 487 (1994). *Heck* instructed courts to dismiss such a damages action if success would "necessarily imply the invalidity of [the] conviction or sentence[,] . . . unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated" -- for example, by reversal on direct appeal or issuance of a writ of habeas corpus. *Id.* at 487. In *Edwards v. Balisok*, the Court applied *Preiser* and *Heck* to a case analogous to Skinner's: a state prisoner's § 1983 challenge to the procedures

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State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

employed in a disciplinary proceeding that resulted in revocation of his good-time credits. 520 U.S. 641 (1997). The prisoner sought neither restoration of those credits nor damages for their loss; he sought only damages for violations of procedural due process at his hearing. *Id.* at 645. Nonetheless, the Court concluded that his action was barred because "[t]he principal procedural defect complained of . . . would, if established, necessarily imply the invalidity of the deprivation of his good-time credits," and would therefore shorten his sentence "absent a new hearing." *Id.* at 646-47. The prisoner had alleged that his hearing officer, motivated by "deceit and bias," *id.* at 647, had "concealed exculpatory witness statements" and otherwise denied him the opportunity to defend himself, *id.* at 644, 646. If those allegations were proven, the Court said, the disciplinary decision could not stand. *See id.* at 647. Accordingly, "'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.'" *Id.* at 643 (quoting *Heck*, 512 U.S. at 487).

In *Muhammad v. Close*, the Court summarized this line of cases as follows. "Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . . ." 540 U.S. 749, 750 (2004). If success in a "damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence." *Id.* at 751.

The *Preiser-Heck-Balisok* trilogy involved suits by state prisoners under 42 U.S.C. § 1983. In *Razzoli v. Bureau of Prisons*, this court applied *Balisok* to a federal prisoner's claim for damages under the Privacy Act's accuracy provisions. Prison officials had found cocaine and a razor blade in Razzoli's cell and imposed "a sanction that included the loss of 60 days statutory good time credit." 230 F.3d at 373. Razzoli alleged "that the BOP staged the incident." *Id.* at 373. "The theory of Razzoli's Privacy Act claim," we explained, was "that BOP and the Parole Commission violated 5 U.S.C. § 552a(e)(5) by maintaining in their files and using a false record, the report of the drug possession incident, even though they knew it to be false." *Id.* at 374. We concluded that this claim "clearly runs afoul of *Balisok*" because, "[i]f BOP knowingly preserved and acted upon a totally invented record of drug possession, plainly the recision of good time would have to be overturned, thus accelerating Razzoli's release." *Id.*[3] Accordingly, we affirmed the dismissal of Razzoli's Privacy Act claim, instructing that he could refile it only if he were "successful in overturning [BOP's] actions through a petition for habeas." *Id.* at 376.[4]

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[3] Although we noted that there was "the possibility of renewed revocation of the good time credit in a new [untainted] hearing," that possibility did not change the analysis. *Razzoli*, 230 F.3d at 375; *see Balisok*, 520 U.S. at 646-47.

[4] *See White*, 148 F.3d at 1125 (holding that a prisoner's claim for damages under the Privacy Act, alleging that his presentence report contained

Skinner's claim for damages under the Privacy Act is virtually indistinguishable from the claims barred in *Balisok* and *Razzoli*. In order to obtain damages, Skinner must allege that "the agency acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4). And he does, contending that BOP "willfully relied upon incomplete and inaccurate records to discipline him unfairly for allegedly possessing cocaine." Amicus Curiae Br. 3; *see id.* at 9-10; Compl. at 3-4. In particular, Skinner asserts that "BOP fabricated its drug test results" and "purposely excluded the [allegedly exculpatory] Referral Form from [his] records in order to retaliate against or otherwise punish him" for an assault complaint he had filed against a prison guard. Amicus Curiae Br. 28-29; *see id.* at 28 (citing Compl. at 2-3); Pl.'s Mot. to Alter or Amend J., Ex. A (Regional Administrative Remedy Appeal). But "the due process requirements for a prison disciplinary proceeding are . . . not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence." *Balisok*, 520 U.S. at 647. If Skinner were to succeed in demonstrating that BOP intentionally or willfully maintained and acted upon a false record of drug possession, "plainly the recision of good time would have to be overturned, thus accelerating [Skinner's release." *Razzoli*, 230 F.3d at 374. As a consequence, he must first proceed in habeas, notwithstanding

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inaccuracies requiring him to serve more time, was not cognizable "unless the sentence has been invalidated in a prior proceeding").

that in this case he seeks only damages and not restoration of good time. *Id.* at 372- 73; *cf. Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) (holding "that a state prisoner's § 1983 action is barred (absent prior invalidation) -- *no matter the relief sought* (damages or equitable relief) . . . -- *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration" (first emphasis added)).

Skinner contends that, even if his claim for damages for loss of good time must first proceed in habeas, the same is not true of his claims for "damages for other, separate disciplinary harms." Amicus Curiae Reply Br. 27. But although those other punishments -- namely, disciplinary segregation and the loss of visitation rights and commissary privileges -- did not affect the length of Skinner's incarceration, they are not "separate" from the punishment that did. As Skinner's complaint avers, all of his punishments resulted from the same "Incorrect Information" in his file -- and from the same finding of guilt at the same hearing on the basis of that information. Compl. at 1.[5] Amicus

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[5] *See* Compl. at 3 (complaining of the "adverse effect in record determining custody, classification, job, quarter assignment and the los[s] of forty (40) days good conduct credits"); Amicus Curiae Br. 7 (stating that, "[a]s a result" of the hearing officer's determination that Skinner was guilty, he "was denied visitation for a year, denied commissary privileges for 180 days, his good time credit was discounted 40 days, and he was placed in segregation or solitary confinement for 60 days").

conceded as much at oral argument.[6] Hence, because recovery for the "other, separate disciplinary harms" depends on overturning the adverse determination that also led to his loss of good-time credits, if Skinner were to win damages for the former, he would necessarily have demonstrated the invalidity of the latter.

Amicus insists that it is nonetheless possible to distinguish the two types of discipline. In amicus' view, we need not determine that the white powder was detergent rather than cocaine to vindicate Skinner's damages claim; we need only find that the records at Skinner's hearing were inaccurate or incomplete because they omitted the referral form. Had the hearing officer seen the form, amicus continues, that might have been enough to keep him from ordering Skinner held in segregation, even if not enough to prevent him from revoking Skinner's good-time credits. Amicus Curiae Reply Br. 28. But even on this theory, to obtain damages for being held in segregation Skinner still must show that BOP *intentionally or willfully* kept the allegedly exculpatory FBI form out of his disciplinary hearing. *See* 5 U.S.C. § 552a(g)(4); Amicus Curiae Reply Br. 3 (arguing that Skinner's "prison segregation [was] based on willfully inaccurate records"). And as we have explained above, if he were to succeed in making such a showing, that would "necessarily

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[6] *See* Oral Arg. Recording at 6:22-50 (agreeing that the good time, segregation, and commissary sanctions were all based on the same finding that Skinner possessed cocaine rather than detergent).

imply the invalidity of the deprivation of his good-time credits" as well, *Balisok*, 520 U.S. at 646-47. *See Razzoli*, 230 F.3d at 374.[7]

Finally, amicus urges us not to apply the habeas-channeling rule here because the district court did not rely on it. Instead, the court rested dismissal of Skinner's complaint on BOP's exemption of its records from the Privacy Act. But this court can "affirm a correct decision even if on different grounds than those assigned in the decision on review," a principle "particularly applicable when reviewing a dismissal for failure to state a claim, [which is] a pure question of law which we review *de novo*." *Razzoli*, 230 F.3d at 376 (internal quotation marks and citations omitted). Amicus does not dispute our authority in this regard, but correctly notes that we generally do not decide cases on grounds that were not raised in the district court,

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[7] Although *Razzoli* recognized that a state prisoner is confined to habeas only if his successful claim would "necessarily imply" a shorter period of confinement, 230 F.3d at 375 (internal quotation marks omitted), it held that habeas is exclusive for a federal prisoner "even when a non-habeas claim would have a merely probabilistic impact on the duration of custody," id. at 373. *See Davis v. Bureau of Prisons*, No. 08-5053, 2009 WL 1791872, at *1 (D.C. Cir. June 5, 2009). This aspect of *Razzoli* is not relevant here because -- as discussed in the text -- Skinner's success in a damages action would necessarily imply the invalidity of the revocation of his good-time credits.

absent exceptional circumstances. *See Kurke v. Oscar Gruss and Son, Inc.*, 454 F.3d 350, 358 & n.8 (D.C. Cir. 2006). Indeed -- as amicus also correctly points out -- the Supreme Court held in *Muhammad v. Close* that the government had waived a habeas exclusivity argument by failing to raise it below. 540 U.S. at 755.

But here the government *did* raise the habeas argument in the district court, identifying it as a "third and independent ground for dismissal." Mem. in Support of Defs.' Mot. to Dismiss and/or for Summ. J. at 10 n.2. Although the government raised the point only in a footnote, that footnote cited the controlling precedent -- *Razzoli* -- and expressly "reserve[d] the right to brief [the habeas] point at some later stage of the litigation if such stage should come to pass." *Id.* That later stage never came to pass in the district court because the court ruled for the government on the basis of the exemption. But that stage has come in this court, and both the government and Skinner (and amicus) have had a full opportunity to brief the issue. Moreover, this case is not like *Muhammad*, where the government's habeas argument depended on a disputed question of fact -- whether the plaintiff had actually lost any good-time credits. 540 U.S. at 754-55. Rather, BOP's argument here raises only legal questions that we decide de novo. Thus, there is no unfairness in our affirming on this alternative ground. *Cf. United States v. Bowman*, 496 F.3d 685, 695 n.2 (D.C. Cir. 2007) (noting that an appellate court may not affirm on a ground not relied upon by the district court if doing so would "unfairly deprive [the plaintiff] of an adequate opportunity to respond").

III

We affirm the district court's dismissal of Skinner's claim for amendment of his records on the ground that those records are exempt from the amendment provision of the Privacy Act. We affirm the court's dismissal of Skinner's damages claim because such a claim is not cognizable unless Skinner first secures relief through a writ of habeas corpus.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANK A. SKINNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-1376
	)	(RWR)
UNITED STATES	)	
DEPARTMENT	)	[Entered: June 20, 2005]
OF JUSTICE, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

This matter is before the Court on consideration of defendants' motion to dismiss or, in the alternative, for summary judgment.[1] Having considered defendants' motion, plaintiff's opposition, and the entire record of the case, the Court will dismiss this action for failure to state a claim upon which relief can be granted.

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[1] The Dismissal Order accompanying this Memorandum Opinion also addresses three pending non-dispositive motions filed in this case.

BACKGROUND

Plaintiff is a federal prisoner who currently is incarcerated at the United States Penitentiary in Atlanta, Georgia. He brings this action against the United States Department of Justice and the Federal Bureau of Prisons ("BOP") under the Privacy Act, 5 U.S.C. § 552a.

On November 27, 2001, there was a "massive shake down" in the USP Atlanta unit where plaintiff was housed. Compl. at 2 & Ex. A (Referral of an Inmate Matter for Investigation). Staff allegedly found packages containing white powder in plaintiff's locker, and the powder tested positive for cocaine. *Id.* Plaintiff countered that, not only did staff plant the packages in his locker, but also that the white powder was laundry detergent. *Id.* at 2, 3. In subsequent disciplinary proceedings, plaintiff "was found guilty of infraction code 113, possession of narcotics, marijuana, drugs or related paraphernalia not prescribed for the individual by the medical staff." Pl.'s Supp. Mem. (Pl.'s Aff.), ¶ 15; *see* Pl.'s Opp., Ex. I (Discipline Hearing Officer Report). Among the sanctions imposed were placement in disciplinary segregation and disallowance of good time conduct credit. *Id.*

Plaintiff alleges that BOP records pertaining to him in its Inmate Central Records System are incorrect. The records allegedly fail to reflect that the white powder substance was laundry detergent, not cocaine. Compl. at 3. This incorrect information, plaintiff alleges, led to adverse determinations regarding his custody classification, job and quarters assignments, among other things. He demands

monetary damages "for placement in segregation on November 27, 2001 thru March 26, 2002," and "for adverse effect in record determining custody, classification, job, quarter assignment and the lose [sic] of forty (40) days good conduct credits." Compl. at 3. He also seeks injunctive relief.[2]

DISCUSSION

A complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The ruling on a motion under Rule 12(b)(6) does not test a plaintiff's likelihood of success on the merits; rather, it tests whether a plaintiff properly has stated a claim. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The factual allegations of the complaint are presumed to be true and are construed liberally in plaintiff's favor. *See, e.g., United States v. Phillip Morris, Inc.*, 116 F.Supp. 2d 131, 135 (D.D.C. 2001). The Court is not obligated, however, to draw factual inferences that are not supported by the facts alleged. *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

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[2] *Citing Sellers* v. *Bureau of Prisons*, 959 F.2d 307 (D.C. Cir. 1992), plaintiff asserts that defendants "did not meet requirements of Privacy Act by indicating that inmate disputed information in his files." Compl. at 1. The Court presumes that plaintiff also demands injunctive relief in the form of amendment of the relevant records.

> The Privacy Act requires that an agency:
>
> > maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as toassure fairness to the individual in the determination.

5 U.S.C. § 552a(e)(5). An individual may access a federal government agency's records or information pertaining to him in a system of records, and may request amendment of records pertaining to him. *See* 5 U.S.C. § 552a(d). He may file a civil action against an agency which refuses to amend its records upon request, or fails to maintain its records with the requisite level of accuracy and completeness. *See* 5 U.S.C. § 552a(g); *Sellers v. Bureau of Prisons*, 959 F.2d 307, 310 (D.C. Cir. 1992) (subsection (g) provides civil remedies for violations of subsection (e)(5)).

An agency may promulgate regulations to exempt any system of records within the agency from any part of the Privacy Act, except from subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i), if the system of records is:

> maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including . . . correctional, probation, pardon, or parole authorities, and which consists of . . . reports identifiable to an

> individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

5 U.S.C. § 552a(j)(2) (emphasis added). Pursuant to this authority, regulations exempt BOP's Inmate Central Records System (JUSTICE/BOP-005) from subsections (c)(3) and (4), (d), (e)(2) and (3), (e)(4)(H), (e)(8), (f) and (g). *See* 28 C.F.R. § 16.97(a)(4). Consequently, insofar as plaintiff demands the amendment of the records at issue, such relief is unavailable under 5 U.S.C. § 552a(g). *See White v. United States Probation Office*, 148 F.3d 1124, 1125 (D.C. Cir. 1998) (barring claim for amendment of presentence report maintained in Inmate Central Records System); *Risley v. Hawk*, 108 F.3d 1396, 1397 (D.C. Cir. 1997) (per curiam) (denying injunctive relief on the ground that regulations exempt BOP records from amendment provision of Privacy Act.

In addition, pursuant to 5 U.S.C. § 552a(j)(2), BOP's Inmate Central Records System is exempt from subsection (e)(5) of the Privacy Act.[3] *See* 28 C.F.R. § 16.97(j) (effective August 9, 2002); *see also* 28 C.F.R. § 16.97(k)(2). Having exempted its records from the substantive provision regarding the agency's record-keeping obligations, BOP effectively

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[3] The variation in language between section 552(e)(5) and section 552 (g)(1)(C) of the Privacy Act is "of no substantive significance." *Doe* v. *United States*, 821 F.2d 694, 698 n.10 (D.C. Cir. 1987) (*en banc*).

deprives litigants of a remedy for any harm caused by the agency's substandard record-keeping. Accordingly, insofar as plaintiff demands damages for BOP's failure to maintain records in its Inmate Central Records System pertaining to him with the requisite level of accuracy and completeness, damages are not available.

CONCLUSION

Presuming the truth of plaintiff's factual allegations and construing them liberally in plaintiff's favor, the Court concludes that the complaint fails to state a claim upon which relief can be granted. The BOP's Inmate Central Records System is exempt from the Privacy Act's accuracy and amendment provisions, such that plaintiff is not entitled to the relief he demands. Accordingly, the Court will grant defendant's motion to dismiss. A Dismissal Order accompanies this Memorandum Opinion.

Signed this 17th day of June, 2005.

/s/
RICHARD W. ROBERTS
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANK A. SKINNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-1376
	)	(RWR)
UNITED STATES	)	
DEPARTMENT	)	[Entered: March 29,
OF JUSTICE, *et al.*,	)	2006]
	)	
Defendants.	)	
	)	

ORDER

This matter is before the Court on consideration of plaintiff's "Motion to Alter or Amend Judgment," which the Court construes as a Motion for Relief from Judgment or Order under Rule 60(b) of the Federal Rules of Civil Procedure.[1] Relief

[1] By its caption, it appears that plaintiff intended to file a motion to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). Rule 59(e) requires that a motion be filed no later than 10 days after entry of judgment. Fed. R. Civ. P. 59(e). Because plaintiff's motion was filed more than 10 days after entry of the Court's June 20, 2005 Memorandum Opinion and Order, it is treated as a motion for relief

under Rule 60(b) should be used sparingly and should be applied only in extraordinary circumstances. *See Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1140 (D.C. Cir. 1988); *Piper v. United States Dep't. of Justice*, 374 F.Supp.2d 73, 78 (D.D.C. 2005). Under Rule 60(b), the Court "may relieve a party . . . from a final judgment, order, or proceeding for . . . any [] reason justifying relief from the operation of the judgment."[2] Fed. R. Civ. P.

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from judgment or order under Fed. R. Civ. P. 60(b). *See, e.g., Computer Professionals for Social Responsibility v. United States Secret Service*, 72 F.3d 897, 903 (D.C. Cir. 1996) ("An untimely motion under Rule 59(e) may be considered as a motion under Rule 60(b) if it states grounds for relief under the latter rule."); *Lightfoot v. District of Columbia*, 355 F. Supp.2d 414, 420-21 (D.D.C. 2005) (noting general rule that motion for reconsideration is treated as a 59(e) motion if filed within ten days of entry of challenged order, or as a 60(b) motion if filed thereafter).60(b)(6).

[2] Plaintiff does not specify the Rule 60(b) provision on which he relies. It appears that either Rule 60(b)(1) for the Court's "mistake," or the "catch-all" clause of Rule 60(b)(6) would apply. Relief under Rule 60(b)(6) is not available "unless the other clauses, (1) through (5), are inapplicable." *Goland v. Central Intelligence Agency*, 607 F.2d 339, 372-73 (D.C. Cir. 1978). A district court's authority to correct an error of legal reasoning under Rule 60(b)(1) is unclear. *See Ctr. for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 939 (D.C. Cir.

In its June 20, 2005 Memorandum Opinion and Order, the Court concluded that plaintiff failed to state a Privacy Act claim for correction of agency records pertaining to him because the records at issue, maintained in the Federal Bureau of Prisons' Inmate Central Record System, are exempt from the amendment provisions of the Privacy Act. Further, the Court concluded that plaintiff could not recover monetary damages because a regulation exempted the relevant records from the accuracy provisions, *see* 5 U.S.C. § 552a(e)(1), (5), of the Privacy Act.[3] That regulation became effective on August 9, 2002. *See* 28 C.F.R. § 16.97(j); 67 Fed. Reg. 51,754 (Aug. 9, 2002).

Plaintiff states that the "adverse determination occurred exactely [sic] (8) months November 27, 2001 before August 9, 2002 effective

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1986) (declining to address whether rule "allow[s] corrections of substantive legal errors"); *United States v. Pollard*, 290 F.Supp.2d 153, 157-58 (D.D.C. 2003) (agreeing "with those circuit courts that oppose the use of Rule 60(b) to correct legal errors"); *Ward v. Kennard*, 200 F.R.D. 137, 139 (D.D.C.) (denying Rule 60(b) motion where plaintiff "is merely arguing that the court made an error of legal reasoning"), *aff'd*, 2001 WL 1154507 (D.C. Cir. Aug. 13, 2001). Accordingly, it appears that Rule 60(b)(6) is the relevant provision here.

[3] Damages may be awarded if "the agency acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4).

exemption of section 552a(e)(5)." Pl.'s Mot. at 2. He argues that "this action should not have been dismissed based on the Privacy Act other rights because it's a particular damage claim." *Id.* at 3. It appears that the regulation exempting BOP's Inmate Central Records System from the Privacy Act's damages provisions was not in effect at any time relevant to the complaint, and thus would not bar plaintiff's claim for monetary damages.[4]

Although inclined to grant the plaintiff's Rule 60(b) motion, the Court is without jurisdiction to do so. Before plaintiff filed the instant motion, he filed a notice of appeal.[5] "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam).

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[4] Whether plaintiff adequately states a claim for monetary damages remains to be seen.

[5] Initially, plaintiff indicates that his appeal is limited to the orders denying two particular motions, one for injunctive relief [#39] and the other pertaining to a proposed amendment to the complaint [#41]. In his motion for leave to proceed in *forma pauperis* on appeal, however, he suggests his intention to appeal "in it's [sic] entirety." See Affidavit Accompanying Permission to Appeal in Forma Pauperis [#53]. Given that pro se filings are liberally construed, see Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court presumes that plaintiff is appealing the case "in its entirety," including the June 20, 2005 Order.

Accordingly, it is hereby

ORDERED that plaintiff's motion to alter or amend [#51] is DENIED.

SO ORDERED.

Signed this 23rd day of March 2006.

/s/
RICHARD W. ROBERTS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANK A. SKINNER,	)
	)
Plaintiff,	)
	)
v.	) Civil Action No. 04-1376
	) (RWR)
UNITED STATES	)
DEPARTMENT	) [Entered: March 31,
OF JUSTICE, *et al.*,	) 2008]
	)
Defendants.	)
	)

MEMORANDUM ORDER

The United States Court of Appeals for the District of Columbia Circuit has ordered plaintiff's appeal to be held in abeyance pending this court's "definitive decision whether it would grant the motion to alter or amend the judgment absent the perceived jurisdictional bar." *Skinner v. Dep't of Justice*, No. 05-5284 (D.C. Cir. Aug. 3, 2006). That motion, which this Court construes as one for relief from judgment or order under Rule 60(b) of the Federal Rules of Civil Procedure, will be denied.[1]

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[1] The Court's Memorandum Opinion and Order, signed on June 17, 2005, were entered on the docket on June 20, 2005. Because plaintiff's motion was filed more than 10 days after entry of the Order, it is

I. BACKGROUND

Plaintiff's cause of action arose from events occurring on November 27, 2001 at the United States Penitentiary in Atlanta, Georgia. There was a "massive shake down" in the unit where plaintiff was housed. Compl. at 2 & Ex. A (Referral of an Inmate Matter for Investigation). Staff allegedly found in plaintiff's locker envelopes containing a white powder substance which field-tested positive for cocaine. *Id.*, Ex. B (November 27, 2001 Memorandum to Operation Lieutenant). According to plaintiff, the white powder was laundry detergent, not cocaine. *Id.* at 3. In subsequent disciplinary proceedings, plaintiff was charged with and "was found guilty of infraction code 113, possession of narcotics, marijuana, drugs or related paraphernalia not prescribed for the individual by the medical staff." Pl.'s Supp. Mem. ("Pl.'s Aff.") ¶ 15; *see* Pl.'s Opp'n to Defs.' Mot. to Dismiss or for Summ. J., Ex. I (Discipline Hearing Officer Report on Incident Report No. 941389). Among other sanctions, plaintiff was placed in disciplinary segregation for 60 days and he lost visiting privileges for one year, and good conduct credit. *Id.*, Ex. I at 2-3.

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treated as a motion for relief from judgment or order under Fed. R. Civ. P. 60(b). See, e.g., *Computer Prof'ls for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996); *Derrington-Bey v. District of Columbia Dep't of Corr.*, 39 F.3d 1224, 1225 (D.C. Cir. 1994).

Plaintiff brought this action against the Federal Bureau of Prisons ("BOP") under the Privacy Act, *see* 5 U.S.C. § 552a. He alleges that records pertaining to him and to the November 27, 2001 incident are incorrect.[2] Specifically, he contends that the records fail to reflect that the white powder substance found in his locker was laundry detergent, not cocaine. Compl. at 3. This incorrect information, plaintiff alleges, led to adverse determinations regarding his custody classification, job and quarters assignments, among other things. *See id.* He demands monetary damages "for placement in segregation on November 27, 2001 thru March 26, 2002," and "for adverse effect in record determining custody, classification, job, quarter assignment and the lose [sic] of forty (40) days good conduct credits." *Id.*

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[2] Plaintiff does not identify the offending records. The Court presumes that plaintiff is referring to the documents pertaining to the shake down and resulting disciplinary proceedings attached to his various filings. *See* Compl., Ex. A (Referral of an Inmate Matter for Investigation, BOP Case No. ATL-01547(3) & Ex. B (November 27, 2001 Memorandum to Operation Lieutenant regarding positive test result for cocaine); Pl.'s Opp'n to Defs.' Mot. to Dismiss or for Summ. J., Ex. I (Discipline Hearing Officer Report regarding Incident Report No. 941389) & Ex. J (Investigation dated January 21, 2002). Other attachments pertaining to his requests for information under the Freedom of Information Act do not appear relevant to his Privacy Act claims.

The Court granted defendants' motion to dismiss. *Skinner v. United States Dep't of Justice*, No. 04-1376, 2005 WL 1429255, at *3 (D.D.C. June 17, 2005). As is stated in the supporting Memorandum Opinion, the Court found that plaintiff's claims were barred because regulations promulgated by BOP's Director exempt the Inmate Central Records System, where the allegedly incorrect records are maintained, from the amendment and damages provisions of the Privacy Act. *Id.*, 2005 WL 1429255, at *2; *see* 28 C.F.R. § 16.97(a)(4). In addition, because regulations exempt the Inmate Central Records System from the accuracy provision of the Privacy Act, *see* 28 C.F.R. § 16.97(j) (effective August 9, 2002), the Court concluded that BOP effectively deprives plaintiff of a remedy for harm caused by alleged inaccurate recordkeeping. *Skinner*, 2005 WL 1429255, at *2.

In his Rule 60(b)(6) motion, plaintiff notes that the "adverse determination occur[r]ed exact[]ly (8) months November 27, 2001 before August 9, 2002 effective exemption of section 552a(e)(5)." Motion to Alter or Amend Judgment ("Pl.'s Mot.") at 2 (emphasis in original). Although this statement is inartfully written, the Court construes it as an assertion that his claim for damages survives because the regulation exempting the Inmate Central Records System from the accuracy provision of the Privacy Act was not effective at the time the underlying incident occurred.[3]

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[3] The effective date of the regulation is of questionable significance. One federal district court determined that, when BOP's Director promulgated regulations to exempt the Inmate Central Records

II. DISCUSSION

A plaintiff "must clear a very high bar to obtain relief under Rule 60(b)(6)." *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007). "[M]otions to reconsider under Rule 60(b)(6) apply only to 'extraordinary situations' and 'should be only sparingly used.'" *United States v. Pollard*, 290 F. Supp. 2d 153, 157 (D.D.C. 2003) (quoting *Twelve John Does v. District of Columbia*, 841 F.2d 1133,

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System from the Privacy Act's accuracy provision, "any inchoate § 552a(e)(5) claim [a plaintiff] may once have had was extinguished." *Williams v. Farrior*, 334 F. Supp. 2d 898, 905 (E.D. Va. 2004), *aff'd*, 122 Fed. Appx. 65 (4th Cir.) (*per curiam*), *cert. denied*, 546 U.S. 907 (2005). In that case, the court rejected a prisoner's claim for damages where the alleged Privacy Act violation occurred seven weeks before effective date of the regulations exempting the Inmate Central Records System from subsection (e)(5). *Id.*, 334 F. Supp. 2d at 905. In another case, a federal district court proceeded to determine whether a plaintiff was entitled to damages under the Privacy Act, *see* 5 U.S.C. § 552a(g)(1)(C), (g)(4), where the complaint challenging the accuracy of a Disciplinary Hearing Officer report was filed in 1999, roughly three years before BOP's Director promulgated the regulations exempting BOP records from the Act's accuracy provision. *Cordero v. Bureau of Prisons*, No. 4:99-2165, 2005 WL 1205808, at *3 (M.D. Pa. Apr. 27, 2005) (Magistrate Report and Recommendation).

1140 (D.C. Cir. 1988)); *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980). "[A]s a precondition to relief under Rule 60(b), the movant must provide the district court with reason to believe that vacating the judgment will not be an empty exercise or a futile gesture." *Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995) (citation omitted). However extraordinary the remedy, "it is within the district court's discretion to grant [relief under Rule 60(b)] in order to do justice." *Ritter v. Smith*, 811 F.2d 1398, 1400 (11th Cir.) (citing *Klapprott v. United States*, 335 U.S. 601(1949)), *reh'g denied*, 817 F.2d 761(11th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

The Privacy Act requires that an agency:

> maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as to assure fairness to the individual in the determination.

5 U.S.C. § 552a(e)(5). An individual may file a civil action against the agency if it:

> fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the

> basis of such record, and consequently a determination is made which is adverse to the individual.

5 U.S.C. § 552a(g)(1)(C); *see Sellers v. Bureau of Prisons*, 959 F.2d 307, 310 (D.C. Cir. 1992) (subsection (g) provides civil remedies for violations of subsection (e)(5)). In a civil suit filed pursuant to 5 U.S.C. § 552a(g)(1)(C), if the agency's actions were willful or intentional, the Court may award actual damages sustained by the individual as a result of the agency's recordkeeping failures. 5 U.S.C. § 552a(g)(4)(A).

In order to recover monetary damages under the Privacy Act, "a plaintiff must assert that an agency failed to maintain accurate records, that it did so intentionally or willfully, and, consequently, that an 'adverse' 'determination [wa]s made' respecting the plaintiff." *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002) (quoting 5 U.S.C. § 552a(g)(1)(C)). Plaintiff bears the burden of proving that the agency's actions in violating thePrivacy Act were intentional or willful. *Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984); 5 U.S.C. § 552a(g)(4). To meet his burden, plaintiff "must prove that the offending agency acted 'without grounds for believing [its actions] lawful' or that it 'flagrantly disregarded'the rights guaranteed under the Privacy Act." *Laningham v. United States Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (quoting *Albright*, 732 F.2d at 189). This is a high standard, requiring a showing of "something greater than gross negligence" on the agency's part. *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987).

Plaintiff's first challenge is to show that BOP failed to maintain accurate records pertaining to him. *See Toolasprashad*, 286 F.3d at 583. In this case, the alleged inaccuracy in BOP's records is, essentially, the identity of the white powder substance found in plaintiff's locker. BOP records reflect that the substance tested positive for cocaine; plaintiff insists that the substance was laundry detergent. Plaintiff's sole support for his position is the Federal Bureau of Investigation's decision to decline to pursue the matter for criminal prosecution. *See* Compl., Ex. A (Referral of an Inmate Matter for Investigation, BOP Case Number ATL-01547); Pl.'s Mot. at 2 & Ex. 8 (February 12, 2002 letter from A. Lavelle, Supervisory Special Agent, FBI, declining BOP Case No. 01547, among others). According to the FBI, plaintiff's case "lack[s] the criteria to meet prosecutive guidelines that would result in a criminal prosecution of greater penal consequences than [those] which can be imposed by the BOP administrative remedies and actions." Pl.'s Mot., Ex. 8 at 1. The FBI's decision neither refutes the results of the field test conducted by BOP staff nor establishes that the white powder substance was laundry detergent. The plaintiff has failed to show that the relevant BOP records are inaccurate. *See Doyharzabal v. Gal*, No. 7:00-2995-24BG, 2001 WL 35810671, at *3 (D.S.C. Sept. 13, 2001) (plaintiff who offered "little other than bare assertions to support his claim that disputed statements regarding contraband and gang membership were inaccurate" did not establish that BOP records pertaining to him were inaccurate). Without some indication that BOP has failed to maintain accurate records pertaining to plaintiff, it follows that he cannot show that BOP violated his

rights under the Privacy Act and that the agency did so willfully or intentionally. *See Doyon v. United States Dep't of Justice*, 304 F. Supp. 2d 32, 35 (D.D.C. 2004) (plaintiff who was unable to establish that prior drug conviction and probation violation charges reflected in presentence investigation report maintained in Inmate Central Records System were clearly wrong did not demonstrate intentional or willful violation of his rig' ts under the Privacy Act), *appeal dismissed*, 2004 WL 2185923 (D.C. Cir. Sept. 24, 2004).

Furthermore, insofar as plaintiff challenges the Disciplinary Hearing Officer's decision and the disciplinary sanctions imposed, *see* Compl. at 3; Pl.'s Mot. at 2, the Privacy Act is not the proper vehicle for doing so. "The [Privacy] Act [] is intended to remedy 'factual or historical errors,' and is not a vehicle for addressing 'the judgments of federal officials . . . reflected in records maintained by federal agencies.'" *Velikonja v. Mueller*, 362 F. Supp. 2d 1, 16 (D.D.C. 2004) (quoting *Kleiman v. Dep't of Energy*, 956 F.2d 335, 337-38 (D.C. Cir. 1992)), *aff'd*, 466 F.3d 122 (D.C. Cir. 2006) (per curiam); *see Levant v. Roche*, 384 F. Supp. 2d 262, 270-71 (D.D.C. 2005) (noting that "[p]laintiff's true complaint is not about the accuracy of his records, but about the underlying decision they reflect"); *Doyon*, 304 F. Supp. 2d at 34-35 (finding that the Privacy Act is not the means for prisoner to challenge BOP's use of the information or professional judgment of its staff in establishing his custody classification).

Granting plaintiff's motion would be a mere futile gesture as he sets forth no extraordinary

circumstances warranting relief under Rule 60(b)(6). Accordingly, it is hereby

ORDERED that plaintiff's Motion to Alter or Amend Judgment [Dkt. #51] is DENIED.

SO ORDERED.

Signed this 22nd day of March 2008.

/s/
RICHARD W. ROBERTS
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5284 **September Term 2009**

04cv01376

Filed On: December 30, 2009

Frank A. Skinner,
Appellant

v.

United States Department of Justice and
Bureau of Prisons,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards and Randolph, Senior Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: */s/*
Michael C. McGrail
Deputy Clerk

APPENDIX F

STATUTORY PROVISIONS

5 U.S.C. § 552a – Records maintained on individuals

(a) Definitions. For purposes of this section–

(1) the term "agency" means agency as defined in section 552[(f)](e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an

identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected; and

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement

of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to *section 6103(d) of the Internal Revenue Code of 1986* [*26 USCS § 6103(d)*], (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code [*26 USCS § 6103(b)(4)*], (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act [*42 USCS § 604(e), 664*, or 1337]; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act [*42 USCS § 1320b-7*];

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in *section 6103(k)(8) of the Internal Revenue Code of 1986* [*26 USCS § 6103(k)(8)*]; or

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (*42 U.S.C. 402(x)(3), 1382(e)(1)*);

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the

Government of the United States (including survivor benefits).

(b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this *title [5 USCS § 552]*;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the

control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office [Government Accountability Office];

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of certain disclosures. Each agency, with respect to each system of records under its control, shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records. Each agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise

statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements. Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any party of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources or records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to

assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) [Caution: For effective date, see 1988 Amendment note] if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency Rules. In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this *title [5 USCS § 553]*, which shall--

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to

an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g) Civil remedies.

(1) Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such

record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2) (A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3) (A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation

costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of -

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $ 1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians. For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i) Criminal penalties.

(1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $ 5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $ 5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $ 5,000.

(j) General exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this *title [5*

USCS §§ 553(b)(1), (2), and (3), (c), and (e)], to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency, or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this *title [5 USCS § 553(c)]*, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this *title [5 USCS §§ 553(b)(1), (2), and (3), (c), and (e)]*, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to provisions of section 552(b)(1) of this *title [5 USCS § 552(b)(1)]*;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment,

military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this *title [5 USCS § 553(c)]*, the reasons why the system of records is to be exempted from a provision of this section.

(l) Archival records.

(1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section,

be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section [effective 270 days following Dec. 31, 1974], shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors.

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists. An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching agreements.

(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to--

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel, that any information provided by such applicants, recipients, holders and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2) (A) A copy of each agreement entered into pursuant to paragraph (1) shall--

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement

for a current, ongoing matching program for not more than one additional year if--

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and opportunity to contest findings.

(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until--

(A) (i) the agency has independently verified the information; or

(ii) the Date Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that--

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C) (i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of--

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions.

(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to

subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless--

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on new systems and matching programs. Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial report. The President shall biennally submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974 [note to this section].

(t) Effect of other laws.

(1) No agency shall rely on any exemption contained in section 552 of this *title [5 USCS § 552]* to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this *title [5 USCS § 552]*.

(u) Data Integrity Boards.

(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board--

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of

agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including--

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4) (A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5) (A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement

may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that--

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) Office of Management and Budget responsibilities. The Director of the Office of Management and Budget shall--

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

No. 09-1188

In the Supreme Court of the United States

FRANK A. SKINNER, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was required to successfully challenge a Bureau of Prisons disciplinary hearing through an action in habeas corpus before filing a civil damages claim under the Privacy Act, 5 U.S.C. 552a, where recovery for petitioner's alleged disciplinary harms unrelated to the duration of his sentence depended on overturning the adverse determination that also led to the loss of his good-time credits.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 584 F.3d 1093. The opinion of the district court (Pet. App. 19a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2009. A petition for rehearing was denied on December 30, 2009 (Pet. App. 40a-41a). The petition for a writ of certiorari was filed on March 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a federal prisoner housed at a Bureau of Prisons (Bureau) facility in Atlanta, Georgia. Staff at that facility found a white powder in petitioner's cell

that tested positive for cocaine. After a disciplinary hearing, the Bureau imposed various sanctions, including the loss of 40 days of good time credit. Petitioner subsequently filed a complaint in the United States District Court for the District of Columbia seeking damages under the Privacy Act, 5 U.S.C. 552a. The district court dismissed petitioner's action, Pet. App. 19a-24a, and subsequently denied petitioner's motion for relief from the judgment, *id.* at 25a-29a, 30a-39a. The court of appeals affirmed. *Id.* at 1a-18a.

1. On November 27, 2001, Bureau staff searched petitioner's prison cell and found a white powder that tested positive for cocaine. On January 28, 2002, the Bureau conducted an internal disciplinary hearing. At the hearing, petitioner testified that the substance found in his cell was "[T]ide washing powder," which the hearing officer noted in his report. Pet. App. 2a-3a (brackets in original). The officer found, however, that petitioner had possessed cocaine, and the officer imposed sanctions that included the loss of 40 days of good time credit, 60 days of disciplinary segregation, the denial of commissary privileges for 180 days, and the denial of visitation rights for a year. *Id.* at 3a. The Bureau also referred the matter to the Federal Bureau of Investigation (FBI), which declined to prosecute because the case would not result in greater penal consequences than the sanctions already imposed by the Bureau. *Ibid.*

On July 8, 2002, petitioner filed a request with the FBI for information under the Freedom of Information Act, 5 U.S.C. 552. The FBI informed petitioner that its records contained 18 pages that were responsive to his request. Because the documents had originated with the Bureau, the FBI forwarded petitioner's request to the Bureau, which released the documents to petitioner.

One of the documents was the referral form that the Bureau had sent to the FBI. The form contained a typed paragraph stating that chemical tests conducted by the Bureau indicated that the white powder in petitioner's locker was cocaine. Below that paragraph was a handwritten notation: "Actually laundry detergent." The notation was unsigned, undated, and uninitialed. No evidence revealed who made the notation or what it meant. Petitioner acknowledged that the powder had not been sent to the FBI for testing, but nevertheless alleged that the notation reflected the results of an "independ[e]nt analysis" of the powder performed by the FBI. Pet. App. 3a-4a (brackets in original).

2. On August 13, 2004, petitioner filed a complaint in the United States District Court for the District of Columbia. He alleged that the powder found in his locker was laundry detergent rather than cocaine, that the FBI referral form indicated as much, and that the Bureau's records were therefore inaccurate. He requested two remedies under the Privacy Act: amendment of his inmate records and money damages for the sanctions imposed by the Bureau. Pet. App. 4a.

The Bureau moved to dismiss petitioner's complaint for failure to state a claim; in the alternative, it moved for summary judgment. First, the Bureau argued that it had exempted inmate records from the relevant provisions of the Privacy Act. Second, it maintained that petitioner had failed to exhaust administrative remedies seeking amendment of his inmate records. Third, the Bureau offered a "third and independent ground for dismissal" in a footnote: namely, that because success on petitioner's claims would result in the restoration of good time credit, his claims could only be brought in a habeas corpus action. Pet. App. 3a n.1, 4a-5a.

On June 20, 2005, the district court dismissed petitioner's complaint on the first of those grounds, *i.e.*, that petitioner's records were exempt from the relevant provisions of the Privacy Act. Pet. App. 19a-24a. Petitioner appealed but he also filed a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b) in the district court. The court of appeals therefore held petitioner's appeal in abeyance pending disposition of the Rule 60(b) motion. On March 31, 2008, the district court denied the motion for relief from the judgment. Pet. App. 30a-39a.

3. The court of appeals affirmed. Pet. App. 1a-18a.

a. With respect to petitioner's claim for amendment of his records, the court of appeals agreed with the district court's analysis. Pet. App. 6a-7a. Section 552a(e)(5) of the Privacy Act requires agencies to maintain records used "in making any determination about any individual * * * with such accuracy * * * as is reasonably necessary to assure fairness to the individual in the determination." In addition, Section 552a(d) of the Act requires agencies to entertain requests for amendment of records that are inaccurate. 5 U.S.C. 552a(d)(2). As the court of appeals recognized, however, the Bureau has exempted inmate records from the requirements of Section 552a(d). Pet. App. 7a; see *White* v. *United States Probation Office*, 148 F.3d 1124, 1125 (D.C. Cir. 1998). Petitioner does not challenge that holding before this Court.

b. With respect to petitioner's claim from money damages, the court of appeals affirmed on a ground that the district court had not considered. Pet. App. 8a-9a. Section 552a(g)(4) of the Privacy Act permits liability against the United States for "actual damages sustained by the individual as a result of" an agency's "intentional

or willful" failure to maintain accurate records. 5 U.S.C. 552a(g)(4)(A); see 5 U.S.C. 552a(g)(1)(C) (creating private right of action). On August 9, 2002, the Bureau exempted inmate records from the record-maintenance requirements of Section 552a(e)(5)—which was before petitioner filed suit but after his disciplinary hearing. Pet. App. 9a. The court of appeals found it unnecessary to resolve whether the Bureau's exemption from Section 552a(e)(5) would apply in this case, because it affirmed the district court's decision on an alternative ground. *Ibid.*

Specifically, the court of appeals held that petitioner's "civil damages claim is barred unless and until he successfully challenges the disciplinary hearing on which it is based through an action in habeas corpus." Pet. App. 9a. After discussing in detail this Court's and its own precedents on when a prisoner may maintain a damages claim before having overturned the prison action in habeas, the court of appeals observed that "[i]f success in a 'damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.'" *Id.* at 11a (quoting *Muhammad* v. *Close*, 540 U.S. 749, 751 (2004)). The court reasoned that if petitioner "were to succeed in demonstrating that [the Bureau] intentionally or willfully maintained and acted upon a false record of drug possession, 'plainly the recision of good time would have to be overturned, thus accelerating [petitioner's] release.'" *Id.* at 13a (quoting *Razzoli* v. *Federal Bureau of Prisons*, 230 F.3d 371, 374 (D.C. Cir. 2000)). Because petitioner's recovery of damages would necessarily require reinstatement of his good time credit, the court

held that petitioner must proceed in habeas. *Id.* at 14a-16a.

ARGUMENT

The court of appeals held that because success on petitioner's damages claim would necessarily require the restoration of lost good time credit, petitioner must proceed in habeas. Petitioner claims (Pet. 10-28) that the court of appeals' decision is "in [t]ension" with decisions of this Court, Pet. 18, and in conflict with decisions of other courts of appeals. Those claims lack merit, and further review is not warranted.

1. a. As the court of appeals explained, this Court's precedents establish that petitioner is required to proceed in habeas. Pet. App. 9a-12a. In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), state prisoners sought injunctive relief under 42 U.S.C. 1983 to restore good-time credits that had been lost in prison disciplinary proceedings. 411 U.S. at 476. This Court held that a state prisoner seeking such relief may not proceed under Section 1983, but may seek relief in federal court only by a petition for habeas corpus under 28 U.S.C. 2254. *Preiser*, 411 U.S. at 490, 500. *Preiser* thus established that Section 1983 may be used to challenge conditions of confinement, but not to challenge the fact or duration of confinement.

In *Heck* v. *Humphrey*, 512 U.S. 477 (1994), the Court again considered the intersection between Section 1983 and habeas corpus. In that case, a state prisoner sought damages, but not equitable relief, under Section 1983 for an allegedly unconstitutional criminal conviction. *Id.* at 479. The Court reasoned that when "establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction[,] * * * the claimant

can be said to be 'attacking . . . the fact or length of . . . confinement.'" *Id.* at 481-482 (quoting *Preiser*, 411 U.S. at 490). The Court therefore held that habeas corpus is the appropriate vehicle when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487.

In *Edwards* v. *Balisok*, 520 U.S. 641 (1997), the Court held that the *Heck* rule applies not only to convictions but also to prison disciplinary proceedings affecting the duration of confinement. In *Balisok*, a state prisoner brought suit under Section 1983 to challenge a disciplinary hearing that had resulted in multiple sanctions, including the loss of good time credit. *Id.* at 643. The prisoner challenged only the procedures used in the disciplinary hearing and sought only damages and prospective injunctive relief but not restoration of the lost credit. *Id.* at 643-645. This Court nevertheless held that because "[t]he principal procedural defect complained of by [the prisoner] would, if established, necessarily imply the invalidity of the deprivation of his good-time credits," the inmate's claim for money damages was not cognizable under Section 1983. *Id.* at 646; see *id.* at 648.

The court of appeals recognized that in light of the *Preiser-Heck-Balisok* trilogy of cases, a state prisoner's civil action "is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson* v. *Dotson*, 544 U.S. 74, 81-82 (2005); see *Muhammad* v. *Close*, 540 U.S. 749, 751 (2004) ("[W]here success in a prisoner's § 1983 damages action would implicitly question the validity of conviction or duration of sentence,

the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.").

Petitioner correctly notes (Pet. 23-25, 27) that *Preiser*, *Heck*, and *Balisok* involved state prisoners, and that the District of Columbia Circuit has applied different habeas-channeling standards to state and federal prisoners: a state prisoner must proceed in habeas if success on his damages claim would necessarily affect the fact or duration of his confinement, while a federal prisoner must proceed in habeas if success on his damages claim would have a probabilistic impact on the fact or duration of his confinement. See *Razzoli* v. *Federal Bureau of Prisons*, 230 F.3d 371, 373-375 (D.C. Cir. 2000). But that differential treatment is irrelevant in this case, because petitioner must proceed in habeas under either standard. Indeed, the court of appeals expressly declined to rely on the lower probabilistic standard for federal prisoners. Pet. App. 16a n.7 ("This aspect of *Razzoli* is not relevant here because * * * [petitioner's] success in a damages action would necessarily imply the invalidity of the revocation of his good-time credits."). What matters in this case is that petitioner's challenge to his prison disciplinary hearing necessarily implies the invalidity of his deprivation of good time credits.

b. The court of appeals correctly applied that rule to the facts of this case. If petitioner were successful in demonstrating that the Bureau intentionally or willfully maintained and acted upon a false record of drug possession, it would necessarily imply the invalidity of the sanctions for that drug possession, including petitioner's loss of good time credit. See *Razzoli*, 230 F.3d at 374 ("If BOP knowingly preserved and acted upon a totally

invented record of drug possession, plainly the recision of good time would have to be overturned, thus accelerating Razzoli's release."); *id.* at 376 (affirming the dismissal of a similar Privacy Act claim and instructing the prisoner that he could refile the claim only if he were "successful in overturning [the Bureau's] actions through a petition for habeas"). As the court of appeals held, petitioner's "claim for damages under the Privacy Act is virtually indistinguishable from the claims barred in *Balisok* and *Razzoli*," Pet. App. 13a, and as in those cases, petitioner must first bring his claim in habeas.

2. Petitioner incorrectly argues (Pet. 18-24) that the decision below is at odds with this Court's precedents. Petitioner first cites (Pet. 18-19) a footnote from *Preiser* in which this Court suggested that a prisoner could simultaneously litigate civil claims relating to the conditions of confinement and habeas claims relating to the duration of confinement. See 411 U.S. at 499 n.14. But as petitioner acknowledges (Pet. 19), that dictum from *Preiser* predates both *Heck* and *Balisok*. In those cases, this Court squarely held that absent *prior* invalidation of a disciplinary hearing, a prisoner's civil action is barred if success in that action would necessarily demonstrate the invalidity of the fact or duration of the prisoner's confinement. See *Heck*, 512 U.S. at 487; *Balisok*, 520 U.S. at 646, 648.

Petitioner next claims (Pet. 19-21) that the decision below is in tension with *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). In *Wolff*, this Court permitted state prisoners to challenge under Section 1983 the procedures by which they had been deprived of good time credits. *Id.* at 554-555. But as petitioner again acknowledges (Pet. 20-21), this Court explained in *Heck* and *Balisok* that "the claim at issue in *Wolff* did not call into question the

lawfulness of the plaintiff's continuing confinement." *Balisok*, 520 U.S. at 646 (quoting *Heck*, 512 U.S. at 482-483); *ibid.* ("Nor is there any indication in the [*Wolff*] opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits.") (quoting *Heck*, 512 U.S. at 482-483 and adding emphasis).

Petitioner argues that this case is akin to *Wolff*, because he challenges the procedures by which "prison staff intentionally excluded the referral form from the records presented to the hearing officer." Pet. 22. As a threshold matter, the factbound question of whether the court of appeals "misread[]" the allegations in petitioner's complaint does not merit this Court's attention. Pet. 21. In any event, the court of appeals correctly rejected this argument: if petitioner were to show that prison officials had deliberately withheld the referral form, that would necessarily imply the invalidity of the sanctions imposed at the disciplinary hearing, including the deprivation of petitioner's good time credit. Pet. App. 13a, 15a-16a.

Petitioner also contends (Pet. 12-13) that he need not proceed in habeas because, although his disciplinary hearing resulted in the loss of good time credits, it also resulted in other sanctions that do not affect the duration of his confinement. But as the court of appeals explained, that fact—which was equally true in *Balisok* and *Razzoli*—is irrelevant. Because petitioner's non-durational sanctions resulted "from the same finding of guilt at the same hearing on the basis of" "the same 'Incorrect Information' in his file," Pet. App. 14a, success in challenging any of those sanctions "would 'necessarily imply the invalidity of the deprivation of his good-time

credits' as well," *id.* at 15a-16a (quoting *Balisok*, 520 U.S. at 646-647).

3. Petitioner argues (Pet. 10-18) that the decision below is in conflict with decisions of other courts of appeals, but he overstates the extent of the conflict. Petitioner claims (Pet. 15-17) that the Seventh and Eleventh Circuits—in *Viens* v. *Daniels*, 871 F.2d 1328 (1989), and *Gwin* v. *Snow*, 870 F.2d 616 (1989), respectively—authorized civil challenges to non-durational sanctions resulting from disciplinary proceedings that also led to the revocation of good-time credits. Both *Viens* and *Gwin*, however, were decided well before *Heck* and *Balisok*. In light of this Court's intervening case law, the Seventh and Eleventh Circuits have recognized that a prisoner may not pursue a damages action that, if successful, would necessarily imply the invalidity of any portion of his sentence.*

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* See *Montgomery* v. *Anderson*, 262 F.3d 641, 644 (7th Cir. 2001) ("Montgomery can achieve review of the [prison disciplinary] board's decision by concentrating on [the punishment of reduction in] his credit-earning class, so *Edwards* blocks use of § 1983 unless Montgomery prevails in the § 2254 proceedings."); *Evans* v. *McBride*, 94 F.3d 1062, 1063 (7th Cir. 1996) (recognizing that its analysis in *Viens* had "changed" in light of *Heck*), cert. denied, 519 U.S. 1131 (1997); see also *Uboh* v. *Reno*, 141 F.3d 1000, 1006 (11th Cir. 1998) ("[A] civil proceeding challenging the grounds on which the prosecution against Uboh had been commenced indirectly would implicate the question of Uboh's guilt; this type of parallel inquiry by way of a civil suit prior to the resolution of a criminal action based on the same set of events is precisely the quandary that *Heck* prohibits.").

Petitioner argues (Pet. 16 n.1) that the Seventh Circuit could not have intended to depart from *Viens* in *Montgomery* because it did not follow circuit rules applicable when a proposed panel opinion would overrule a prior decision of the court. But in light of the Seventh Circuit's earlier recognition that *Heck* had "changed" the approach used in *Viens*, see *Evans*, 94 F.3d at 1063, that court likely did not see the need to express-

Petitioner also relies (Pet. 13-15) on the Second Circuit's decision in *Peralta* v. *Vasquez*, 467 F.3d 98 (2006), cert. denied, 551 U.S. 1145 (2007). In *Peralta*, the court held that "a prisoner who was subject to a single disciplinary proceeding that gave rise to sanctions that affect both (a) the duration of his imprisonment and (b) the conditions of his confinement" may maintain a civil action "aimed solely at the latter sanctions" without first proceeding in habeas, if the prisoner "is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement." *Id.* at 104 (emphasis omitted); see *id.* at 105 (concluding that judicial estoppel would apply to a prisoner "who was subject to mixed sanctions and who, having agreed to abandon forever his duration claim, was allowed to proceed separately with his conditions of confinement claim under § 1983").

Although the Second Circuit's approach in *Peralta* differs from the District of Columbia Circuit's approach in this case, the Court's review is nonetheless not warranted at this time. The conflict is limited and of recent vintage. The Second Circuit's holding has not been examined by the other courts of appeals, and this Court's review could benefit from additional consideration of the question by lower courts. Indeed, the Court denied review in *Peralta*, even though that decision was already at odds with the holdings of several circuits. See, *e.g.*, *Montgomery*, 262 F.3d at 644; *Gotcher* v. *Wood*, 122 F.3d 39 (9th Cir. 1997); *Sheldon* v. *Hundley*, 83 F.3d 231, 233-234 (8th Cir. 1996); see also 06-1307 Pet. 8-10, *Jones* v. *Peralta*. There is no reason for a different result here.

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ly overrule *Viens* in *Montgomery*. In any event, it is plain that, since *Viens*, the Seventh Circuit has adopted the exclusivity rule of *Heck* and *Edwards*. See *Post* v. *Gilmore*, 111 F.3d 556, 557 (1997).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

FRANK A. SKINNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE and BUREAU OF PRISONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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Petitioner Frank A. Skinner respectfully files this reply in support of his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

ARGUMENT

A. The Conflict Among the Circuits on the Question Presented Is Deep and Mature

In its brief in opposition, the government does not contest that there is a conflict among the Circuits on the question presented -- namely, whether a prisoner may bring a civil damages action, or is instead limited to habeas, to challenge non-durational harms in mixed sanctions cases. Mixed sanctions cases are those in which a prison disciplinary proceeding leads both to durational harms, such as the loss of good-time credits, and to non-durational harms, such as placement in segregation or the loss of prison privileges. Skinner has sought to bring a damages claim under the Privacy Act, 5 U.S.C. § 552a, to challenge segregation and loss of visitation and commissary privileges resulting from a disciplinary proceeding that also led to the loss of good-time credits. The government concedes that the Second Circuit would allow Skinner to bring his civil action so long as he renounced any right to dispute the loss of good-time credits, *see Peralta v. Vasquez*, 467 F.3d 98, 100-03 (2d Cir. 2006), but that the D.C. Circuit in this case oppositely found his civil action to be barred absent success in a habeas proceeding. *See* Pet. App. 14a-15a.

Rather than disputing the existence of a Circuit conflict, the government merely asserts that the Circuit

split is "limited and of recent vintage." U.S. Opp. at 12. Even if that were true, the conflict at this juncture would be clear and irreconcilable. Both Judge Calabresi's opinion for the Second Circuit in *Peralta* and Judge Garland's opinion for the D.C. Circuit here address the mixed sanctions question head-on and with thorough analysis; yet, the opinions diverge widely. Under these circumstances, there is no reason to expect the Circuit conflict to wane, and this Court should grant the petition to resolve the split.

In any event, the split among the Circuits is far deeper than the government surmises. For one thing, the government agrees with Skinner that the Eighth Circuit sides with the D.C. Circuit in holding that a prisoner may not pursue civil claims for non-durational harms in mixed sanctions cases. *See* U.S. Opp. at 12; Pet. at 13. Accordingly, even under the government's view of things, there has been a split between the Eighth and the Second Circuits on the question presented since at least 2006, when the Second Circuit in *Peralta* allowed the prisoner there to proceed civilly to challenge the non-durational punishment. And *Peralta* has plainly gained support in the district courts over the past several years. *See, e.g.*, *Brown v. Marshall*, No. CIV S-07-0956-MCE-DAD-P, 2009 U.S. Dist. LEXIS 86176, at *2-5 (E.D. Cal. Sept. 4, 2009); *Pollard v. Romero*, No. 07-cv-00399-EWN-KLM, 2008 U.S. Dist. LEXIS 33404, at *17-20 (D. Colo. Apr. 23, 2008); *see also, e.g.*, *Scott v. Nichols*, No. 9:10-CV-0230, 2010 U.S. Dist. LEXIS 49561, at *1-2 (N.D.N.Y. May 19, 2010); *Phelan v. Hersh*, No. 9:10-CV-0011, 2010 U.S. Dist. LEXIS 4252, at *9-10 (N.D.N.Y. Jan. 20, 2010). Thus, just considering the Circuits that *the government* concedes to have

reached the mixed sanctions question, a mature conflict exists: There is solid support at this time for the Second Circuit's position, as well as added support -- now with the D.C. Circuit's holding here -- for the view inaugurated by the Eighth Circuit.

Moreover, the Seventh and Eleventh Circuits have adopted positions more lenient to prisoner rights in mixed sanctions cases than even the Second Circuit. That sets up a Circuit conflict whereby the Eighth and D.C. Circuits categorically prohibit civil remedies in mixed sanctions cases, the Second Circuit adopts a hybrid approach (*i.e.*, permitting a prisoner to proceed with civil remedies as to non-durational harms, if the prisoner relinquishes the right subsequently to challenge durational harms), and the Seventh and Eleventh Circuits readily authorize the prisoner to proceed in a challenge to non-durational aspects. *See* Pet. at 18. The Seventh Circuit in *Viens v. Daniels*, 871 F.2d 1328 (7th Cir. 1989), held that a prisoner can challenge non-durational sanctions in a mixed sanctions case (even without renouncing relief with respect to durational harms), at least if the non-durational punishments are "substantial." *Id.* at 1334; *accord id.* at 1336 (Ripple, J., concurring). The Eleventh Circuit, without any qualification, has permitted prisoners to proceed with claims involving non-durational punishments in mixed sanctions cases. *See Gwin v. Snow*, 870 F.2d 616, 618-19, 624 (11th Cir. 1989).

The government says that *Viens* and *Gwin* are no longer good law in their respective Circuits. *See* U.S. Opp. at 11 & n.*. As to the Seventh Circuit, the government first claims that *Evans v. McBride*, 94 F.3d 1062 (7th Cir. 1996), upended *Viens*. But *Evans* ad-

dressed only a portion of *Viens* (dictum in *Viens*, even) discussing whether positing a claim as *one for damages* is, alone, sufficient to avoid habeas; *Evans* did not raise any issue about proceeding civilly when a prison disciplinary proceeding results in mixed sanctions. *See Viens*, 871 F.2d at 1332, 1333 (court noting that it "need not resolve" whether the form of "*relief* sought" allowed for Viens's civil claim, because of the alternate ground that Viens was suing in a mixed sanctions case) (emphasis in original).

The government's more substantial point on *Viens* is that the decision seemingly is irreconcilable with *Montgomery v. Anderson*, 262 F.3d 641 (7th Cir. 2001). In *Montgomery*, in a three-sentence passage that does not reference the thorough analysis in *Viens*, the court held that a prisoner must proceed via habeas where the punishment included both the loss of good-time credits and a reduction in "credit-earning class." *Id.* at 644. The government seizes on that passage from *Montgomery* as an implicit indication that the Seventh Circuit saw *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997), as overruling *Viens*. *See* U.S. Opp. at 11-12 n.*.

The government, however, reads too much into *Montgomery*, for, even before *Viens*, the Seventh Circuit presciently had adopted what would become *Heck*'s and *Balisok*'s rule that a prisoner's civil claim is barred if it would *necessarily imply* the invalidity of the fact or duration of confinement. *See Viens*, 871 F.2d at 1332 (citing *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986), and *Crump v. Lane*, 807 F.2d 1394 (7th Cir. 1986)). If the Seventh Circuit adopted the approach it did in *Viens* against the backdrop of existing Circuit

precedent comparable to the subsequent decisions in *Heck* and *Balisok*, it makes no sense to argue, as the government does, that the Seventh Circuit later must have meant to abrogate *Viens* (and even do so *sub silentio*) because of *Heck* and *Balisok*. Instead, *Montgomery* is best treated as an uninformed decision that, under governing Circuit rules, cannot overrule prior precedent to the contrary. *See* Pet. at 17 n.1; *cf.* Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 Duke L.J. 1, 33 & n.126 (Oct. 2008) [hereinafter "King & Sherry"] (describing *Montgomery* as a decision containing "little discussion" and whose "basis . . . is not entirely clear").[1]

The government's dismissal of the Eleventh Circuit's *Gwin* holding is much more easily cast aside. According to the government, the Eleventh Circuit -- also *sub silentio* -- overruled *Gwin* when it rehearsed *Heck*'s holding in *Uboh v. Reno*, 141 F.3d 1000, 1006 (11th Cir. 1998). *Uboh*, however, involved no question regarding mixed sanctions, or any non-durational punishment at all. Indeed, *Uboh* does little more than

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[1] Conceivably, to be charitable to *Montgomery*, a subsequent panel of the Seventh Circuit might seek to reconcile the decision with *Viens*. *Viens* mandates that the non-durational punishment imposed in a mixed sanctions case must be substantial to survive habeas, and arguably the non-durational harm in *Montgomery* was not substantial (or at least not as substantial or as important to the prisoner as the loss of good-time credits). Under that reading, *Montgomery* and *Viens* both remain good law, and the Seventh Circuit would continue to add to the complexity of the existing Circuit split.

state the unremarkable proposition that *Heck* precludes a prisoner from challenging in a civil action, rather than through habeas, "the validity and justification of the criminal proceedings" resulting in his conviction. *Uboh*, 141 F.3d at 1006.

In sum, there is a mature, complex Circuit split on the question presented. At least five Circuits have spoken on the issue, and they have adopted several divergent approaches. The Court should grant the petition to resolve the conflict.[2]

B. The Court of Appeals' Decision Is in Tension with This Court's Decisions

The government disputes Skinner's assertion that the decision below conflicts with this Court's precedents. At the outset, the government does recognize that dictum in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), is on point and supportive of Skinner's position. On this score, *Preiser* straightforwardly states: "If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confine-

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[2] The government contends that the Ninth Circuit, like the Eighth and D.C. Circuits, has demanded that a prisoner proceed exclusively in habeas to challenge non-durational harms in mixed sanctions cases. *See* U.S. Opp. at 12 (citing *Gotcher v. Wood*, 122 F.3d 39 (9th Cir. 1997)). The government's view is not shared by courts within the Ninth Circuit. *See Brown v. Marshall*, 2009 U.S. Dist. LEXIS 86176, at *2-5 (following *Peralta*). In any case, if *Gotcher* can be seen as aligned with the Eighth Circuit's and D.C. Circuit's view of habeas's exclusivity in mixed sanctions cases, then the decision only further deepens the Circuit split to involve six Circuits (the Second, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits) rather than five.

ment," the exclusivity of habeas for the claims challenging the latter "in no way precludes him from simultaneously litigating in federal court, under [42 U.S.C.] § 1983, his claim relating to the conditions of his confinement." *Id.* at 499 n.14. Notably, *Preiser*'s statement was joined by all nine Justices in the case. *See id.*; *see also id.* at 510 (Brennan, J., dissenting).

Nonetheless, the government dismisses *Preiser*'s teaching not just as dictum but as supposedly disavowed -- still again *sub silentio* -- by *Heck* and *Balisok*. *Heck* and *Balisok* were not mixed sanctions cases, and neither speaks at all about the rules to be applied in a mixed sanctions situation. Moreover, to assert conclusorily that *Heck* and its progeny decide the mixed sanctions issue begs the question presented, which is at its core whether the Court's current jurisprudence does or does not authorize a civil suit in mixed sanctions circumstances. Further, the government's position that *Heck* and *Balisok* so readily refute *Preiser*'s unanimous statement contradicts the courts and commentators who have emphasized that the Court's decisions have "left open" the issue of habeas's exclusivity in the mixed sanctions setting. *Peralta*, 467 F.3d at 103; *accord Pollard*, 2008 U.S. Dist. LEXIS 33404, at *18; King & Sherry, 58 Duke L. J. at 33.

The government also contests that the D.C. Circuit's decision is in tension with *Wolff v. McDonnell*, 418 U.S. 539 (1974). The government says that Skinner's analogy to *Wolff* impermissibly draws the Court into a "factbound question" as to how to read his pleadings. U.S. Opp. at 10. But Skinner does not petition this Court, and invoke *Wolff*, to correct a misconstruction of his factual allegations. Rather, Skinner's point is that

this Court previously has -- in *Wolff* -- permitted a prisoner to proceed with civil claims on the part of his case not necessarily impacting the duration of his confinement while, at the same time, finding the part affecting the duration of confinement barred by habeas. In this case, just as in *Wolff*, the complaint's allegations potentially can be construed not as a challenge to "a biased hearing officer" (*Balisok*, 520 U.S. at 647 (interpreting *Wolff*)), which would necessarily undermine the hearing officer's findings on both durational and non-duration punishment, but as a challenge to prison officials who prepared the record for the hearing officer. Skinner contends that, if that record-keeping infirmity were corrected, the hearing officer conceivably could have imposed the durational punishment, but not the more serious non-durational segregation and loss of privileges. *See* Pet. at 21-22.

C. The Question Presented Is Important and Warrants the Court's Review

The government minimizes the importance of clarifying whether and to what extent a prisoner can sue to challenge non-durational harm in a mixed sanctions case. The government's position flies in the face of what Justices and commentators alike previously have said, what state governments previously have asserted, the high regard this Court always has shown for resolving disputed issues concerning habeas's exclusivity, and the critical importance of the question presented to prisoners and to lower courts adjudicating prisoner cases.

Justices of this Court previously have urged the Court to resolve the question whether prisoners must proceed exclusively in habeas when their civil claims

"include challenges to the conditions, as well as to the length or duration, of confinement." *Bressman v. Farrier*, 498 U.S. 1126, 1128 (1991) (White & O'Connor, J.J., dissenting from denial of certiorari); *accord Preiser*, 411 U.S. at 508 (Brennan, J., dissenting). That the Court has, in the meantime, issued *Heck* and other decisions further clouding the picture (from a backdrop of straightforward instruction in *Preiser* favorable to the prisoner's civil action on non-durational harm, to a situation where the court of appeals below thought *Heck* might require a different result) only adds to the cert-worthiness of this case. Similarly, commentators have suggested that the Court should resolve "the problem of mixed claims." King & Sherry, 58 Duke L. J. at 33.

In addition, states have also categorized the mixed sanctions question as an important one warranting this Court's consideration. Though the (federal) government here attempts to use the denial of certiorari in *Peralta* in its favor, the *Peralta* proceedings in this Court, if anything, support granting Skinner's petition. In *Peralta*, it was officials of the State of New York that petitioned for certiorari, asserting that "there is a stark conflict among the circuits on a question that has wide impact on the litigation of prisoner claims in the federal courts." *Jones v. Peralta*, No. 06-1307 (U.S.), Pet. at 10. With another Circuit (*i.e.*, the D.C. Circuit) now having weighed in, and *Peralta* gaining still further support among lower courts (*see supra* p. 2), the plea of the state officials in *Peralta* currently has even greater resonance. After all, the vast majority of situa-

tions involving mixed sanctions arise in the state prisoner setting (via 42 U.S.C. § 1983).[3]

Next, the government's dismissal of the question presented as unimportant cannot be reconciled with this Court's historic concern for delineating the proper respective domains for prisoner civil claims and habeas. In just the past sixteen years, the Court has issued four decisions addressing the scope of habeas's exclusivity. *Wilkinson v. Dotson*, 544 U.S. 74 (2005); *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam); *Balisok*, *supra*; *Heck*, *supra*. And this Term, the Court will hear another case testing the boundaries of habeas's exclusivity. *Skinner v. Switzer*, No. 09-9000 (U.S.) (petition granted on May 24, 2010; oral argument scheduled for Oct. 13, 2010).

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[3] Skinner's case, of course, raises claims against federal entities, and the government insists that his petition's aim at federal officials should not give it any added significance. *See* U.S. Opp. at 8. In the petition, Skinner noted that the D.C. Circuit has given habeas's exclusivity a wider scope in federal settings than in state settings; Skinner further noted that, though this distinction did not directly figure into the D.C. Circuit's decision here, it potentially could arise in any review in this Court. *See* Pet. at 23-24, 27. Thus, granting the Petition could provide the added benefit of allowing the Court to address (for the first time) the standards for channeling litigation against federal officials through habeas, an issue that has already resulted in disagreement within the D.C. Circuit itself. Skinner's assertion is that, through the vehicle of this case, which otherwise is already cert-worthy, the Court may be able to stave off a growing dispute over habeas's exclusivity in the area of prisoner claims against the federal government.

Nor does the government anywhere acknowledge the significance of the question presented to the prison population or to lower courts faced with large volumes of prisoner litigation. Currently, prisoners, who oftentimes are without counsel, are faced with litigating the preliminary question of the appropriate forum and format in which to bring their dispute in every instance where they challenge a disciplinary proceeding that resulted in durational and non-durational punishment; and federal courts with already busy dockets must wade through that preliminary matter in such cases. A clear rule regarding mixed sanctions cases would help streamline prisoner litigation, for the benefit of prisoners and courts, and even prison litigation officials faced with defending the litigation.

Finally, the government -- conspicuously -- never addresses the prospect, recognized by Justices of this Court and by the Circuits, that the rule favoring habeas's exclusivity in a case like Skinner's "would create the incentive to include as part of every instance of prisoner punishment a sanction . . . affect[ing] the duration of the prisoner's sentence -- even if it would just be the loss of one day's worth of good-time credit." *Peralta*, 467 F.3d at 106 n.8; *accord Preiser*, 411 U.S. at 508-09 (Brennan, J., dissenting); *Viens*, 871 F.2d at 1333. In light of the "unfortunate incentives" engendered by the D.C. Circuit's decision (*Peralta*, 467 F.3d at 106 n.8), as well as the Circuit split that the decision deepens and the decision's tension with *Preiser* and *Wolff*, the Court should grant the petition and afford plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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